No. 77-1387

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

DAVID R. MERRILL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Open Market Committee of the Federal Reserve System, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–18A) is reported at 565 F. 2d 778. The opinion of the district court (App. C, *infra*, pp. 21A–45A) is reported at 413 F. Supp. 494.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 19A–20A) was entered on November 10,

1977. On January 27, 1978, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 10, 1978, and on March 2, 1978, he further extended the time to and including April 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal agency may defer public disclosure of statements of final policy decisions required to be disclosed by the Freedom of Information Act, where the brief delay is necessary to permit effective implementation of the agency's policy.

STATUTE AND REGULATION INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> * * * * *
>
> (D) * * * statements of general policy * * * formulated and adopted by the agency.
>
> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> * * * * *
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; * * * unless the materials are promptly published and copies offered for sale.
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

2. 12 C.F.R. 271.5 provides:

> (a) *Deferred availability of information.* In some instances, certain types of information of the Committee are not published in the FEDERAL REGISTER or made available for public inpection or copying until after such period of time as the Committee may determine to be reasonably necessary to avoid the effects described in paragraph (b) of this section or as may otherwise be necessary to prevent impairment of the effective discharge of the Committee's statutory responsibilities.
>
> (b) *Reasons for deferment of availability.* Publication of, or access to, certain information

of the Committee may be deferred because earlier disclosure of such information would

(1) Interfere with the orderly execution of policies adopted by the Committee in the performance of its statutory functions;

(2) Permit speculators and others to gain unfair profits or to obtain unfair advantages by speculative trading in securities, foreign exchange, or otherwise;

(3) Result in unnecessary or unwarranted disturbances in the securities market;

(4) Make open market operations more costly;

(5) Interfere with the orderly execution of the objectives or policies of other Government agencies concerned with domestic or foreign economic or fiscal matters; or

(6) Interfere with, or impair the effectiveness of, financial transactions with foreign banks, bankers, or countries that may influence the flow of gold and of dollar balances to or from foreign countries.

STATEMENT

1. The Federal Open Market Committee of the Federal Reserve System ("the Committee"), which is composed of the members of the Board of Governors of the Federal Reserve System and five representatives of the Federal Reserve Banks, has the responsibility under the Federal Reserve Act for directing the operations of the System in the open market. Section 12A, as added, 48 Stat. 168, and amended, 12 U.S.C. 263. The Committee authorizes and directs Federal Re-

serve Bank purchases and sales of government securities and certain other securities in the domestic securities market. These operations are conducted through a combined investment pool, called the System Open Market Account, by the System's Account Manager in New York, under guidelines and instructions from the Committee (C.A. App. 69).[1]

The Committee employs open market operations to influence the availability and cost of bank reserves, bank credit and money. These purchases or sales of securities directly affect the level of the reserves of member banks, which in turn influences both interest rates and the ability of banks to make loans and investments. As the court of appeals observed (App. A, *infra*, p. 4A n. 4), "[w]hen the Account Manager purchases securities, the total volume of commercial bank reserves is increased. This results in increased loans and investments, and decreased interest rates, thus affecting spending and investment in the economy. When the manager sells securities, the money supply decreases and the process is reversed." The Federal Reserve System considers its open market operations to be the System's most important monetary policy instrument, not only because of their prompt and direct effect on the level of reserves, but also because open market operations, unlike other tools of monetary policy, permit the System to implement changes gradually or to probe in a given direction while main-

[1] "C.A. App." refers to the appendix filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

taining the ability to withdraw from that course if necessary (C.A. App. 60, 63, 67–68).[2]

The Committee meets approximately once a month to discuss policy objectives and to give policy guidance to the Account Manager for the period until the Committee's next meeting. The Committee's guidelines for the System's open market operations in the upcoming month are embodied in a Domestic Policy Directive, which is a statement of general monetary policy. The Domestic Policy Directive includes the Committee's objectives for the monetary aggregates,[3] which are stated as tolerance ranges for growth of the money supply over specified periods of time and similar tolerance ranges for the federal funds rate (C.A. App. 61–63).[4]

[2] Open market operations by the Account Manager involve enormous sums of money. In 1974, for example, the total dollar volume of outright purchases and sales of United States Government securities by the Committee was approximately $19.4 billion, and the total dollar volume of matched sale-purchase transactions and sales with repurchase agreements was approximately $135 billion (C.A. App. 115).

[3] Monetary aggregates are the various definitions of the nation's money supply used by the Committee in its operations. The principal definitions are "M_1" and "M_2". "M_1" is the currency in circulation plus demand deposits held by the public in commercial banks, and "M_2" is "M_1" plus time and savings deposits, other than large certificates of deposit, held in commercial banks (C.A. App. 118).

[4] For example, the tolerance ranges for January 1975 were 3½ to 6½ percent growth for M_1, 7 to 10 percent growth for M_2, and 6½ to 7¼ percent for the federal funds rate (C.A. App. 118). The federal funds rate is the rate at which banks are willing to lend excess reserves on an overnight basis (*id.* at 115).

The Account Manager's day-to-day operations are guided by the Domestic Policy Directive, including the tolerance ranges for the money supply and federal funds rate, and by a daily conference call with the staff and at least one member of the Committee (C.A. App. 41, 62, 115). The Manager may exercise numerous options to buy or sell any quantity of several different kinds of securities, or he may do nothing at all. The choice of method is the Manager's, but in making that choice he must consider the Committee's instructions in light of developing conditions in the market (*id.* at 115–116).

Pursuant to 12 C.F.R. 271.5, the Committee defers public availability of each month's Domestic Policy Directive until a few days after the following month's meeting.[5] Thereafter, the Directive is published in the *Federal Register,* made available for public inspection at the Federal Reserve Board's Public Information Office as part of the Committee's Minutes of Actions, and released to the press in a document called the Record of Policy Actions (C.A. App. 53).[6]

[5] Prior to March 1975, the Committee deferred release of the Directive for 90 days (App. A, *infra*, p. 5A n. 7). On March 24, 1975, the period of delay was changed to 45 days. 40 Fed. Reg. 13204. The present policy was adopted on May 24, 1976. 41 Fed. Reg. 22261.

[6] The Record of Policy Actions is subsequently published in the monthly *Federal Reserve Bulletin* and in the Board's Annual Report. In addition to the Directive, the Record of Policy Actions

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2. Respondent, a law student with "a strong interest in administrative law and the operation of agencies of the federal government" and a desire to study "the process by which the [Committee] regulates the national money supply through the frequent adoption of domestic policy directives" (C.A. App. 6), commenced this litigation in May 1975 in the United States District Court for the District of Columbia. Respondent contended that 12 C.F.R. 271.5, under which the Committee temporarily defers public release of the monthly Directive and tolerance ranges, is contrary to the "prompt" disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552(a)(2)(B) and (a)(3).

The Committee submitted a number of affidavits, including two by Federal Reserve Board member Robert C. Holland, explaining that the policy of delaying public availability of the Directive and tolerance ranges for a short time had been adopted out of concern that the immediate disclosure of this information was likely to lead to exaggerated market reactions that would seriously interfere with the orderly execution of the Committee's monetary policies, would increase substantially the annual interest payments to underwriters of government bonds, and would enable market participants engaged in the speculative trading of government securities to gain unfair profits and advantages (C.A. App. 67, 117).

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includes the votes cast by Committee members in connection with open market policy, the reasons underlying the Committee's policy actions, and any dissenting views (C.A. App. 53–54).

The district court granted summary judgment for respondent, holding that the Committee's records of its policy actions are not protected against disclosure by Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), because the records are not predecisional, but are the decisions themselves (App. C, *infra,* p. 37A). The court also held that the Committee's deferred release regulation, even if justified by reasons of monetary policy, failed to satisfy the Act's requirement of "current" and "prompt" disclosure (*id.* at 43A). Accordingly, the court ordered the Committee to cease enforcing 12 C.F.R. 271.5 insofar as it deferred public release of policy actions, to publish the Domestic Policy Directive in the *Federal Register* on adoption, and to make its other policy actions, including statements and interpretations of policy, available for public inspection without delay (*id.* at 44A).

The court of appeals affirmed, agreeing with the district court that the Committee's Directives and tolerance ranges are not predecisional, deliberative communications and that they therefore "cannot fall within Exemption 5's incorporation of the deliberative process privilege" (App. A, *infra,* p. 10A). The court of appeals acknowledged that disclosure of some final decisions might be deferred until they take effect (*id.* at 12A n. 16), but it rejected the related contention that the legislative history of the FOIA shows that Congress intended to prevent premature disclosure of even final and effective decisions where too-prompt disclosure would inhibit the effectiveness of an agency's policy (*id.* at 11A). The court reasoned that,

"even if it appeared that Exemption 5 was written with precisely the situation of the instant case in view, we must require [immediate] disclosure unless it is demonstrated that the material in dispute would not be available under the rules of civil discovery" (*id.* at 14A; footnotes omitted). Because no civil discovery privilege recognized at the time that the FOIA was passed would protect the Committee's Directives and tolerance ranges from disclosure (*id.* at 15A–18A), the court of appeals concluded that they must be released as soon as they are adopted.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals that the Federal Open Market Committee's monthly Domestic Policy Directive and tolerance ranges must be disclosed to the public immediately after their adoption threatens a serious impairment of the Federal Reserve System's open market operations, its most important monetary policy instrument to help achieve the nation's economic goals. Immediate disclosure of these instructions would affect market conditions in unintended and undesirable ways, and hence it would frustrate the Committee's attempts to control the money supply; it is likely to enable sophisticated market participants engaged in the speculative trading of government securities to gain unfair profit and advantages; and it may increase by as much as $300 million annually the cost of financing the federal government's debt. Moreover, the court's interpretation of the Freedom of Information Act apparently

would require other agencies that have reached "final" decisions on matters still subject to implementation, such as contract bids, negotiating positions, or offers to purchase or sell property, to disclose those decisions before they are carried out; disclosures such as these inevitably would inhibit effective execution of the agency's policy.[7]

These consequences are not required by the FOIA. Congress recognized that the premature disclosure of even final plans and decisions sometimes would harm governmental operations, and it therefore intended that the Committee's monthly Directive and tolerance ranges be protected from immediate disclosure by Exemption 5 of the Act. What is more, a temporary withholding of public access to agency decisions such as the Committee's monthly Directive and tolerance ranges, unlike a permanent denial of access, would undermine none of the interests that the Act was designed to advance.

1. Exemption 5 permits the nondisclosure of "inter-agency or intra-agency memorandums or letters which

[7] The Committee argued in the court of appeals that its Directive and tolerance ranges are predecisional guidelines protected from disclosure by Exemption 5 and that the *final* decision is that made by the Account Manager in buying or selling securities in the open market. Although we believe that the court of appeals' rejection of this argument is incorrect, we have not presented the issue to this Court because the question depends essentially on an analysis of the particular nature of the instructions given to the Account Manager and the role played by that official in the Committee's open market operations. Moreover, as we discuss below, the issue is not dispositive because the FOIA was intended to bar premature disclosure of some agency decisions that may be characterized as "final."

would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). This exemption was intended to protect documents that would not "routinely be disclosed to a private party through the discovery process in litigation with the agency." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Although the exemption's principal function is to avert disclosures that might affect the deliberative process by deterring uninhibited discussion in matters concerning policy-making and decision-making (S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)), that is not its only purpose. See Davis, *Administrative Law Treatise* § 3A.21, p. 157 (1970 Supp.). The Act's legislative history demonstrates that Exemption 5 also was designed to protect against the *premature* disclosure of agency plans.[8] Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 Tex. L. Rev. 1261, 1272 (1970).

In congressional hearings prior to enactment of the FOIA, a number of federal agencies expressed concern that they would be required, to their detriment, to disclose plans, negotiating positions, contract bids, and other "final" decisions before those

[8] The two purposes are not wholly distinct. Here, for example, the Committee's deliberate processes certainly would be affected by the knowledge that its formal decisions would be released prematurely. A rule requiring immediate disclosure thus might persuade the Committee to resort to "informal" understandings with the Account Manager, to adopt language in the Directive or tolerance ranges aimed at counteracting anticipated market response to the disclosure, or to employ other tactics not conducive to reasoned policy-making.

plans or instructions had been carried out.[9] See, *e.g.*, Hearings on S. 1160 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 418 (1965) (Defense Department), *id.* at 480 (General Services Administration); Hearings on H.R. 5012 before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 224 (1965) (Post Office Department). Indeed, among the witnesses was the Acting General Counsel of the Department of the Treasury, who testified that premature disclosure of information about Federal Reserve System purchases of government securities in the market "could be very damaging to the general interest." Hearings on H.R. 5012, *supra*, at 49.

Congress responded to these concerns. The House Report on the Act states (H.R. Rep. No. 1497, *supra*, at 5–6):

> [I]n some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for nondis-

[9] Government agencies, for example, often issue instructions to their employees on the maximum price to pay for equipment or real estate. The ceiling is a final decision, but surely not one to be disclosed to the seller until the sale has been negotiated.

> closure, and S. 1160 [the bill that became the FOIA] is designed to permit nondisclosure in such cases.

Accordingly, with respect to Exemption 5, the Report explained (H.R. Rep. No. 1497, *supra,* at 10):

> [A] Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.

See also S. Rep. No. 813, *supra,* at 9. This language "make[s] it clear that the Congress did not intend to require the production of [internal government] documents where premature disclosure would harm the authorized and appropriate purpose for which they are being used." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36 (1967).

2. The unanswered affidavits in this case demonstrate that the premature release of the monthly Directive and tolerance ranges is likely to impede seriously the Committee's performance of its monetary policy functions and might well lead to other deleterious results. As Governor Holland explained, "[o]ne of the most useful aspects of open market operations as a tool of monetary policy is its usefulness in implementing changes gradually or in enabling the

[Committee] to probe in a given direction while maintaining the ability to withdraw from that course if necessary" (C.A. App. 63). This moderate approach is essential to the success of the Committee's policy, because "[e]conomic and financial *stability* is a prime objective of a central bank; and gradual change is often desirable in order to minimize the risk that businessmen, consumers, and investors will overreact and cause economic conditions to worsen, either in the direction of inflation or of recession" (*id.* at 116; emphasis in original).

Immediate public disclosure of the Directive and tolerance ranges would have an "announcement effect" on financial markets, characterized by abrupt movements of securities prices and interest rates as market participants hastened to realize gains in anticipation of the Committee's purchases or sales of securities.[10] The sudden price movements would be contrary to the moderate, gradual reaction traditionally sought by the Committee; perhaps more important, price and rate movements often might be considerably larger than the Committee contemplated. Market participants on occasion might misinterpret the Directive and tolerance ranges, leading to unintended and unwelcome changes that would have to be overcome by further market activity of the Committee (C.A. App. 121).

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[10] The greatest speculative profits would accrue to those large or institutional market participants who accurately assessed the Directive and acted rapidly in buying or selling securities. Other investors, without freely available resources to buy or sell immediately, would be disadvantaged by acting after the "announcement effect" had already run its course.

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The "announcement effect" from immediate disclosure also would lead to substantial additional costs for the government's debt financing. The Department of the Treasury relies heavily on dealers in government securities to help distribute its offerings to ultimate buyers. As a consequence of the sharper fluctuations in interest rates that would likely result from immediate release of the Committee's Directive and tolerance ranges, dealer underwriting risks would be increased. The increase in risk would be accompanied by an increase in payments to compensate the risk-takers. The Treasury estimates that these additional annual expenses would exceed $300 million, given the publicly held marketable debt of $338 billion.[11]

3. In light of these consequences, the court of appeals erred in construing the Act to require public disclosure as soon as the Committee's monthly Directive and tolerance ranges are adopted. Not only was Exemption 5 drafted by Congress to authorize a brief delay in disclosure in precisely this type of situation, but also the courts possess an equitable discretion to fashion a FOIA disclosure order in the public interest.[12]

[11] This amounts to an increase of one-tenth of one percent in the rate of interest.

[12] See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329–330; *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 20–25; *Rose* v. *Department of Air Force*, 495 F. 2d 261, 269 and n. 23 (C.A. 2), affirmed, 425 U.S. 352; Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 767 (1967).

The court of appeals stated (App. A, *infra*, p. 16A n. 22) that disclosure was required, despite any equitable considerations, because Congress had rejected "the public interest standard in

Moreover, a short postponement in release of the Directive and tolerance ranges would not be inconsistent with any of the purposes underlying the Act. A temporary withholding of the materials would not contravene the "strong congressional aversion to 'secret [agency] law'" (*National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 153), because the Committee's instructions apply only to its Account Manager. The Directive and tolerance ranges are not rules that govern the adjudication of individual rights or require particular conduct or forbearance by the public (C.A. App. 114). See *Cuneo* v. *Schlesinger*, 484 F. 2d 1086, 1091 n. 13 (C.A. D.C.), certiorari denied *sub nom. Rosen* v. *Vaughn*, 415 U.S. 977.

By the same token, a delay in disclosure would pose no threat to open government and would do nothing to frustrate public scrutiny of governmental policies. See *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 17. The Directive and tolerance ranges for each month, as well as other records that explain at greater length the economic policy pursued by the Committee, are made available shortly after the succeeding month's meeting. Especially since respond-

favor of [a] broad disclosure policy * * *." This consideration may be persuasive when an agency seeks to withhold on equitable grounds a particular document from an otherwise disclosable category of documents. It may even be persuasive in assessing a contention that the public interest requires that a particular category of documents not be disclosed. But the court's unwillingness to entertain equitable arguments is quite inappropriate, we submit, when the question is not disclosure versus nondisclosure, but only disclosure now versus disclosure 30 days from now.

ent's sole purported interest in examining these documents is to study "to what extent current economic and financial factors are taken into consideration by the [Committee] in the adoption of its domestic policy directives and other policy actions" (C.A. App. 6), access to the Committee's releases for all but the most recent monthly period would fully satisfy his academic needs and would provide an ample record for him or any other person to evaluate the Committee's performance.

In sum, the court of appeals' unyielding interpretation of the FOIA, under which "even if it appeared that Exemption 5 was written with precisely the situation of the instant case in view, we must require disclosure unless it is demonstrated that the material in dispute would not be available under the rules of civil discovery" (App. A, *infra*, p. 14A; footnotes omitted), threatens to disrupt important economic policy without any corresponding public benefits. We submit that the Act's requirement of "prompt," rather than immediate, disclosure envisions that public release, even of "final" agency decisions, may be delayed for a reasonable amount of time where such delay is necessary to the successful accomplishment of the agency's policy decision.[13]

[13] In civil discovery, the model on which Exemption 5 was based, a court has discretion to defer disclosure in the interest of justice. See Fed. R. Civ. P. 26(c)(2).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1978.

APPENDIX A

In the United States Court of Appeals for the District of Columbia Circuit

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No. 76-1379

DAVID R. MERRILL, ET AL.

v.

FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, APPELLANT

Appeal from the United States District Court for the District of Columbia

(D.C. Civil 75-0736)

Argued September 28, 1976

Decided November 10, 1977

Before McGOWAN, LEVENTHAL and ROBB, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* McGOWAN

McGOWAN, *Circuit Judge:* Appellee instituted in the District Court a Freedom of Information Act (FOIA) suit in order to challenge a regulation, 12 C.F.R. § 271.5 (1975), under which appellant Federal Open Market Committee (FOMC) of the Federal Reserve System delays disclosure of certain of its records. On cross motions for summary judgment, the District Court held that the monthly instructions

given by the Committee to the Manager of its Systems Open Market Account, which guide his dealing in securities, do not fall within any exemption of the act, and therefore must be made publicly available upon adoption.

The issue on appeal is the scope of Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5) (1970).[1] That exemption affords civil discovery privileges to intra-agency memoranda, such as the documents in dispute in this case, which would otherwise be subject to disclosure under FOIA.[2] We conclude that the materials sought by ap-

[1] The District Court also held that the materials sought here do not fall within § 552(b)(2), exempting material "related solely to the internal personnel rules and practices of an agency." This finding is not challenged on appeal.

[2] The Freedom of Information Act, 5 U.S.C. 552 (Supp. IV, 1974), provides in pertinent part:

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

* * * * *

"(D) * * * statements of general policy * * * formulated and adopted by the agency.

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

* * * * *

"(B) those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register; * * * unless the materials are promptly published and copies offered for sale.

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

pellee are not encompassed by the government's "executive" or deliberative process privilege. Since appellant is unable to assert any other privilege which would exempt these materials from civil discovery, we hold that they are not within the purview of Exemption 5; and affirm the judgment of the District Court.

I

The Federal Open Market Committee (FOMC), composed of the Board of Governors of the Federal Reserve System and five representatives of Federal Reserve Banks, has responsibility under the Federal Reserve Act for directing Federal Reserve Bank purchases and sales of securities in the domestic securities market. 12 U.S.C. § 263 (1970). The Committee's authority to direct open-market operations is to be utilized "with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country." *Id.* § 263(c). To implement this regulatory responsibility, FOMC has established a Systems Open Market Account, which is a combined investment pool for all Reserve Banks. An Account Manager, appointed by FOMC, conducts open market operations in accordance with instructions from FOMC. These instructions are received in the form of a Domestic Policy Directive, supplemented by a statement of objectives for rates of growth of monetary aggregates (and for the federal funds interest rate) expressed in terms of tol-

(b) This section does not apply to matters that are—

* * * * *

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

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erance ranges.[3] A Directive is issued after each meeting of FOMC, which typically takes place once a month. On occasion, changing conditions require FOMC to amend its Directive or tolerance ranges before its next monthly meeting.

The Directive guides the Account Manager in his open-market operations by stating, for example, whether growth in monetary aggregates (which is achieved by open-market purchases) [4] should be moderate or rapid. In addition to the Directive and tolerance ranges, the Account Manager's operations are guided by daily communication with at least one member of FOMC. However, the Account Manager has discretion as to the method of implementing FOMC policy. He has authority to purchase or sell any quantity of a variety of securities, or he may decide to undertake no transactions at all.

Appellee, by means of a letter dated March 7, 1975, requested access under FOIA to 1) records of policy actions [5] taken by FOMC at its meeting in January

[3] "Monetary aggregates" refer to definitions of the nation's money supply. The "federal funds interest rate" is the rate at which commercial banks will lend excess reserves to one another on an overnight basis.

[4] These open-market operations are an instrument of monetary economic policy. When the Account Manager purchases securities, the total volume of commercial bank reserves is increased. This results in increased loans and investments, and decreased interest rates, thus affecting spending and investment in the economy. When the manager sells securities, the money supply decreases and the process is reversed.

[5] The "records of policy actions" requested include the Domestic Policy Directives adopted at the January 1975 and February 1975 FOMC meetings, the Minutes of Actions for each of these meetings (which include the Directive issued at the meetings), and the "Record of Policy Actions" for each of these

1975 and February 1975, including instructions to the Account Manager, and 2) Memoranda of Discussion at these meetings.[6] The FOMC Secretary replied on March 21, 1975 that records of policy action would be made publicly available 45 days after their adoption, pursuant to 12 C.F.R. § 271.5 (1976).[7] While the reply did not respond to appellee's contention that this deferred disclosure violated FOIA, it did state that FOMC considered its Memoranda of Discussion to be exempt under Exemption 5 from FOIA's disclosure requirements.

Upon appeal to the agency, Robert Holland, a member of the Board of Governors of the Federal Reserve System, released the requested records of policy actions on April 23, 1975 (45 days having elapsed since their adoption), but affirmed the Secretary's decisions that such delay in public release of the records of policy action was warranted, and that the requested

meetings. The latter document includes the Directive, and, less frequently, other policy statements (entitled Authorization for Domestic Open Market Operations, the Foreign Currency Directive, and the Authorization for Foreign Currency Operations) adopted by FOMC. In addition, the "Record of Policy Actions" explains the rationales behind the foregoing policy decisions and the votes thereon by each member of FOMC.

[6] FOMC no longer issues Memoranda of Discussion, which were detailed accounts of FOMC meetings. *Washington Post*, May 25, 1976, § D, pp. 8–9; Appellant's Brief at 12.

[7] When appellee first requested the material in dispute in this case, 12 C.F.R. § 271.5 provided that records of agency action, including Domestic Policy Directives, would not be made available until 90 days after the Directives are adopted by the Commission. The time of delay was changed to 45 days by amendment of the regulation on March 24, 1975, 40 Fed. Reg. 13204. FOMC deferral policy has changed again since this suit was instituted, *see* p. [7A] *infra*.

Memoranda of Discussion were exempt under Exemption 5. Holland's letter constituting final agency action, appellee then filed suit in the District Court, seeking declaratory and injunctive relief against the operation of 12 C.F.R. § 271.5, and an order directing FOMC to release the parts of the Memoranda of Discussion claimed by appellee to be nonexempt under FOIA.

In granting appellee's motion for summary judgment, the District Court rejected FOMC's contentions that the records of policy action (including Domestic Policy Directives) fell under the fifth FOIA exemption, and that release 45 days subsequent to adoption constituted "prompt" disclosure as required by (a)(2)(B) and (a)(3) of the Act. It therefore enjoined the operation of 12 C.F.R. § 271.5 insofar as it permitted delays in disclosure of FOMC policy actions. Holding that the Domestic Policy Directive is a statement of general policy within the meaning of 5 U.S.C. § 552(a)(1)(D), the court ordered FOMC to publish it in Federal Register upon its adoption. Memorandum Opinion at 17–19. Statements and interpretations of other FOMC policy actions were ordered to be made publicly available upon adoption as statements and interpretations of policy, pursuant to 5 U.S.C. § 552(a)(2)(B), (a)(3). *Id.* at 19–21.[8]

After the District Court entered its order, FOMC changed its deferral policy from that described in the

[8] The District Court's ruling with respect to the requested Memoranda of Discussion (now discontinued, *see* note 6 *supra*) is not at issue in this appeal. The court held that appellee was entitled to "reasonably segregable factual portions" of these documents under 5 U.S.C. § 552(b)(5). The court has not yet ruled on the memoranda which have been submitted to it for *in camera* inspection pursuant to this provision.

challenged regulation. All records of policy action are now made available "within a few days" following the FOMC meeting the month after the Directive is adopted.[9] The parties agree that this constitutes compliance with the District's Court's order only with respect to one of the requested documents, that entitled "Records of Policy Actions." This document, described in note 6 *supra*, is not completed and formally adopted until the meeting subsequent to the meeting to which it relates, and, according to Appellant's new deferral policy, is disclosed within a few days of this formal adoption.[10]

However, the District Court's order also requires *separate* and *immediate* disclosure, promptly after the meeting at which they are formulated, of statements and interpretations of FOMC policy, notably the Domestic Policy Directives and their accompanying tolerance ranges issued to the Account Manager. FOMC challenges on appeal that portion of the District Court's order directing it to disclose these documents upon their adoption. Appellant asserts that it may defer public availability of these records because they are encompassed by Exemption 5 of the Act.

II

FOIA provides for prompt mandatory disclosure of statements of policy and interpretations of policy,

[9] Brief of Appellant at 14; *Washintgon Post*, May 25, 1976, § D, p. 9. The Directive is published in the *Federal Register;* the other records are made public in a press release. *Id.*

[10] Beside statements and interpretations of policy, the "Record of Policy Actions" apparently contains material relating to the deliberative process, *see* note 5 *supra*. Appellant has chosen to make this material available after its formal adoption and has not challenged that portion of the District Court's order requiring it to do so.

unless such matters fall within one of the specific exemptions of the Act.[11] The agency carries the burden of showing that requested information falls within an exemption. 5 U.S.C. § 552(a)(4)(B).

Exemption 5 of FOIA protects from mandatory disclosure "intra-agency memorandums * * * which would not be available by law to a party other than an agency in litigation with the agency." This exemption incorporates the civil discovery law: if the document sought would be routinely available to a party in civil discovery, the fifth exemption will not protect it from prompt mandatory disclosure. *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 85–86 (1973). If a document is, however, privileged from civil discovery, it is exempted from mandatory disclosure under FOIA even if, in a particular case, a party in litigation could overcome the privilege by showing of need. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 n. 16 (1975).

This exemption incorporates the familiar "executive" privilege attaching to predecisional communications which reflect the policymakers' deliberative processes. *Id.* at 150–51. This privilege is based on the view that the quality of a decision would be adversely affected if deliberative processes were exposed to pub-

[11] *See* 5 U.S.C. § 552(a)(2): "Each agency, in accordance with published rules, shall make available for public inspection and copying— * * * (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; * * * unless the materials are promptly published and copies offered for sale." Obviously, if the materials are not "promptly published" they must be "promptly" made available for inspection and copying. The concept of "promptly available" also appear in 5 U.S.C. § 552(a)(6)(C). *See also* 5 U.S.C. § 552(a)(4)(D), giving these cases "precedence on the docket" in the District Court.

lic view: such exposure would inhibit discussions by policymakers and their advisors. *Id. See also Environmental Protection Agency* v. *Mink, supra* at 87, 89.

FOMC contends that the disputed materials (the Directives and the tolerance ranges) are predecisional records protected from disclosure by Exemption 5. It is argued that since the Account Manager has a choice in the method of implementing the policy guidelines contained in these documents, and since he consults daily with at least one FOMC member, the actual policy decision is not adopted until he acts, by buying or selling securities on the open market.

We remain unpersuaded that these documents are not FOMC's effective policy decisions until the dealing occurs. While the Account Manager retains considerable leeway in accomplishing the policy established by FOMC, he lacks authority in his position as a subordinate to disregard the Committee's policies. The Directive and tolerance ranges by practical necessity are general instructions to the Manager. That the instructions are general and thereby allow the manager some discretion in their implementation does not undermine the fact that those instructions embody the policy of FOMC.[12] A rule that these policy instruc-

[12] Nor can it be said that these documents are not "adopted" until executed because FOMC can amend them between meetings through consultations with the Manager. To the extent that deliberative communications are exchanged after the vote at the meeting and prior to a new decision which amends the previous vote, they would fall within Exemption 5. However, that a new policy can supersede a prior policy before the latter is executed does not mean that the original policy decision voted by an agency is predecisional. The decision is already reached and its disclosure "poses a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decisions." NLRB v. Sears, Roebuck & Co., *supra* at 152 n. 19 (1975).

tions are not decisions until they are executed would balloon the boundaries of the privilege for deliberative memoranda far beyond its purposes. Many government policies take years to implement.

Moreover, no harm to the consultative functions of FOMC results from disclosing the policy actually adopted by it before the policy is executed.[13] FOMC's instructions to the Account Manager are the result, rather than a part, of the deliberative process. While executive privilege would protect the frank communications which occur *before* FOMC votes on the Directive and the tolerance ranges, it does not protect from disclosure the policy decision itself.[14] We agree with the District Court that the Directives and the tolerance ranges are not predecisional, deliberative communications: they rather embody FOMC's effective policy decision. Accordingly, they cannot fall within Exemption 5's incorporation of the deliberative process privilege.[15]

[13] As we have previously stated, timing alone does not determine whether a specified document is protected under the deliberative privilege: "pre-decisional materials are not exempt merely because they are pre-decisional; they must also be part of the agency give-and-take—of the deliberative process—by which the decision itself is made," *Vaughn* v. *Rosen*, 523 F. 2d 1136, 1143–44 (D.C. Cir. 1975).

[14] We note that FOMC voluntarily exposes the Directive to public view after the meeting succeeding the meeting when the Directive was first formulated and issued to the Account Manager. *See* note 7 *supra*. By this action, it implicitly acknowledges that the exposure will not be harmful to its decisionmaking process and the quality of the decision itself.

[15] FOIA requires that "statements of general policy" adopted by the agency be published in the *Federal Register*, 5 U.S.C. § 552(a)(1)(D), and that "statements of policy" not published be made available for public inspection and copying, *id.* § 522

FOMC urges that its policy instructions to the Account Manager, even if not considered predecisional and part of the deliberative process, fall within Exemption 5 because Congress intended to protect even final decisions from *premature* disclosure. Disclosure of the Directives before execution is asserted to be premature because it would allegedly affect adversely FOMC's ability to control monetary policy.

To support the assertion that the exemption was designed to protect final plans from premature disclosure, appellant quotes part of the House Report's discussion of Exemption 5, which states:

(a)(2)(B). Our conclusion that the materials in dispute in this case represent effective policy decisions not only brings them within the general disclosure requirements of FOIA, as appellants concede, *see* Memorandum Opinion at 10 n. 16, but also makes the executive privilege aspect of Exemption 5 unavailable. This conclusion does not rest on the assumption that Exemption 5 can never apply to materials otherwise subject to disclosure under § 552(a)(1)(D) or § 552(a)(2)(B). First, the executive or deliberative process, privilege is not the only civil discovery privilege incorporated by Exemption 5, *see, e.g., NLRB* v. *Sears, Roebuck & Co., supra* at 159–60 (exemption through incorporation of attorney's work product privilege in Exemption 5). Second, this privilege would be available even to policy statements where it can be shown that these meet the requirements for application of the executive privilege. Admittedly, it is difficult to conceive of a statement which is simultaneously a *policy adopted* by an agency and a *predecisional* communication made as part of the deliberative process. Even if the deliberative process privilege incorporated by Exemption 5 can never operate to exempt statements of effective agency policy, as the District Court apparently concluded, *see* Memorandum Opinion at 16 ("Directives are not exempt from FOIA but are statements of general policy within the meaning of subsection (a)(1)(d)"), and as the Supreme Court has suggested, *see* citations in note 17 *infra*, it can still operate to exempt materials otherwise subject to disclosure under the other provisions of FOIA).

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> [a] Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.

H. Rep. No. 1497, 89th Cong., 2d Sess. p. 10 (1966).

We cannot infer from this language that Congress contemplated that final policy decision such as the one at issue here could be kept secret until executed. The policy directives are "issued" to the Account Manager upon adoption, and they become immediately effective and govern his open-market transactions. The House Report does not indicate that a statement of agency policy may be withheld subsequent to the date it becomes effective.[16]

The Senate Report on the exemption also gives no indication that the effective, working policy of an agency may be withheld. It states:

[16] Indeed, at one point the House Report implies that a document would not be protected past its effective date: "[T]here may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to [public and private] interests." H.R. No. 1497, 89th Cong. 2d Sess. (1966) p. 5. We do recognize, however, that this statement may contemplate delay in disclosure of certain final decisions before they become operative agency policy. Given our conclusion that the materials in dispute in this case are final and effective agency policy when issued, we need not reach appellant's assertion, challenged by appellee, that Exemption 5 may sometimes operate to allow delay, rather than permanent non-disclosure, of intra-agency memoranda.

> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

S. Rep. No. 813, 89th Cong., 1st Sess. p. 9. Manifestly, Congress did not intend to expose all intra-agency communications to public view. However, this passage illuminates its concern centering on predecisional materials the exposure of which would be premature because injurious to the deliberative process. It does not indicate that a final and effective policy decision may be withheld.

Moreover, even if it could be inferred from the legislative history excerpted above that delay in disclosure of certain operative agency policies was contemplated by Exemption 5,[17] the agency claiming exemption would be required to demonstrate that the material sought "would not be available by law to a party." Congress has clearly stated that the criterion for application of the fifth exemption to the disclosure requirements of FOIA is whether the material

[17] *But see NLRB* v. *Sears, Roebuck & Co., supra* at 159–60 ("We should be reluctant * * * to construe Exemption 5 to apply to documents described in 5 U.S.C. § 552(a)(2)."); *Renegotiation Board* v. *Grumman Aircraft*, 421 U.S. 168, 186–88 (1975) (indicating that opinion within the deliberative process exemption cannot qualify as "final opinion" under § 552(a)(2)(A)).

sought would "routinely be disclosed to a private party through the discovery process in litigation with the agency." H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), p. 10. Thus, even if it appeared that Exemption 5 was written with precisely the situation of the instant case in view,[18] we must require disclosure unless it is demonstrated that the material in dispute would not be available under the rules of civil discovery.[19] Ambiguous inferences from legislative history

[18] Appellant points out that the Acting General Counsel of the Treasury Department, in his testimony on the proposed FOIA, argued that premature disclosure of "[i]nformation as to purchases by the Federal Reserve System * * * of Government Securities in the market * * * could have * * * serious effects on the orderly handling of the Government's financing requirements." Appellant's Brief at 24–25. This testimony together with the statements in the committee reports on FOIA are said to show "plainly" that Exemption 5 was intended "to protect against premature disclosure." Of course, the mere fact that both the Acting General Counsel of the Treasury and the committee reports use the word "premature" does not imply that the latter was addressing the specific concern voiced by the former. Moreover, we have already indicated, *see* note 16 *supra*, that delay in disclosure of certain policies and decisions *until they become effective* may be within the purview of Exemption 5.

[19] It is an open question whether Exemption 5 was intended to incorporate all common law privileges. We note that several of these privileges are included in other exemptions to the Act. *See, e.g.*, 5 U.S.C § 552(b)(7) (privilege for investigatory files). The Supreme Court concluded that the exemption extended to the deliberative privilege and the attorney's work product privilege only after satisfying itself that these privileges were in the Congressional contemplation. *NLRB* v. *Sears, Roebuck & Co.*, *supra* at 150, 154 (1975). We need not reach what further privileges Exemption 5 embraces in view of our conclusion that no established privilege would encompass the materials in dispute here, and that therefore Congress could not have intended their exemption.

cannot supplant the clear mandate of the language of the statute.

In addition to its assertion of executive privilege which we have rejected, FOMC urges that its policy instructions meet the criterion of Exemption 5 because they would allegedly be protected from civil discovery by a governmental privilege for "official information." "Official information" is an umbrella term which encompasses several specifically identified privileges attaching to certain defined categories of government information, including information concerning state secrets, information obtained from informers, and information contained in law enforcement investigatory files.[20] The cases relied on by FOMC as the basis for its claim of an official information privilege with respect to the instant materials fall into two categories: (1) cases recognizing a privilege for statements of witnesses given to the government upon promises of confidentiality, and (2) cases recognizing a privilege for law enforcement investigatory files. We conclude that the rationales behind these privileges are inapplicable to the documents at issue in this case. We therefore cannot accept the contention that these specific privileges, when subsumed under the banner of official information, become precedent for assertion of a privilege for FOMC's policy standards.

There does exist a governmental privilege attaching to statements given by individuals to the government

[20] Official information has also been used to connote the privilege surrounding information revealing the deliberative processes of government. *See generally* Cleary, McCormick's Handbook of the Law of Evidence, 229–242 (1972), Wright & Miller, 8 Federal Practice and Procedure § 2019 (1970).

on a promise of confidentiality, which statements are then used by the government in arriving at policy. *See, e.g., Machin* v. *Zuckert,* 316 F. 2d 336 (D.C. Cir. 1963) *cert. denied,* 375 U.S. 896 (1963).[21] This privilege is based upon the need for the government to obtain otherwise unavailable information in order to discharge properly its responsibility to make policy decisions. *See, e.g., Brockway* v. *Department of the Air Force,* 518 F. 2d 1184, 1194 (8th Cir. 1975). Efficient fact-gathering is an essential first step in the decisionmaking process. The privilege for witnesses rests on the recognition that the quality of that process as well as the decision reached is impoverished as access to relevant facts decreases.[22] This privilege cannot be extended to reach the instant situation, because neither the fact-gathering ability nor the decisionmaking proc-

[21] The *Machin* decision held that the Secretary of the Air Force was not required to disclose during pre-trial discovery an investigative report concerning an airline crash.

[22] Appellant cites language in *Machin* that disclosure of the material in that case "would hamper the efficient operation of an important Government program", 316 F. 2d at 339, as support for its contention that an "official information" privilege should be found to encompass the material in dispute in this case. We decline to transform such dictum into precedent for the existence of a broad rule that any information, disclosure of which might impede a particular government program, is "normally privileged in the civil discovery context;" *NLRB* v. *Sears, Roebuck & Co., supra* at 149.

Appellant's position ultimately rests on the claim that its information is privileged and thereby exempt because its disclosure would allegedly adversely affect the public interest. This argument runs counter to Congress' express rejection of the public interest standard in favor of the broad disclosure policy embodied in the FOIA. We cannot perceive anything in the legislative history to persuade us that Congress intended in Exemption 5 to reintroduce the rejected public interest standard.

ess of FOMC would be undercut by disclosures of these final policy decisions.

The second category of cases relied upon by FOMC identify a privilege for governmental documents such as investigatory files, disclosure of which would hamper law enforcement efforts[23] or prejudice another pending, related judicial proceeding.[24] Again, the reasons supporting the privilege in these cases would not be applicable to the policy decisions at issue here. Disclosure here would not affect government law enforcement activities or prejudice a judicial proceeding.

FOMC also seeks to bring the instructions contained in the Domestic Policy Directives and the tolerance ranges under Exemption 5 by claiming that this information would fall within the privilege accorded confidential commercial information under F.R. Civ. P. 26(c)(7). However, appellant fails to present a single case where information generated by the *government* fell within this privilege. At most, only a rough analogy could be drawn between commercial information, protected for reasons of equity in the private sector, and the instruction sought here. In view of our mandate to implement the Act's general philosophy of full agency disclosure unless information is exempt under clearly delineated statutory language," S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), we declined to create, by rough analogy, a privilege not in existence at the time FOIA was en-

[23] *See Capitol Vending Co.* v. *Baker,* 35 F.R.D. 510 (D.D.C. 1964) (documents sought from Attorney General need not be disclosed because they related to ongoing criminal investigation).

[24] *See Campbell* v. *Eastland,* 307 F. 2d 478 (5th Cir. 1962); *Rosenblatt* v. *Northwest Airlines, Inc.* 54 F.R.D. 21 (S.D.N.Y. 1971).

acted, and then incorporate this privilege into an exception to the overriding command of that Act.

III

FOIA requires that information such as the policy statements at issue in this case must be publicly released upon their adoption by the agency unless they fall within a specific FOIA exemption. For reasons stated above, Exemption 5 does not encompass the information that the District Court has ordered FOMC to make available. We note in passing that Exemption 3 allows nondisclosure of material specifically exempted by statute. Should Congress determine that release of the Directives, tolerance ranges and other FOMC documents sought in this suit will impede implementation of national monetary policy, it has the option of enacting for this material a specific statutory exemption from the operation of the Freedom of Information Act, or a specific statutory authority for deferral, amounting to an exemption from the prompt availability requirement. But the making of such exceptions is the function of the legislature, not the court.

The judgment appealed from is affirmed.

It is so ordered.

APPENDIX B

In the United States Court of Appeals for the District of Columbia

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September Term, 1977

Civil 75–0736

[Filed Nov. 10, 1977; George A. Fisher, Clerk]

No. 76–1379

DAVID R. MERRILL, ET AL

v.

FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, APPELLANT

Appeal from the United States District Court for the District of Columbia

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Before: McGOWAN, LEVENTHAL, and ROBB,
Circuit Judges

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment---------- of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
GEORGE A. FISHER,
Clerk,

Date: November 10, 1977.

Opinion for the Court filed by Circuit Judge McGowan.

APPENDIX C

In the United States District Court for the District of Columbia

Civil Action, No. 75-736

[Filed Mar. 9, 1976; James F. Davey, Clerk]

DAVID R. MERRILL, ET AL., PLAINTIFFS
v.
FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, DEFENDANT

MEMORANDUM OPINION

In this action plaintiff charges the defendant with violating the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by refusing to promptly make available certain records of the Federal Open Market Committee. The case is before the Court upon plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment.[1]

Upon consideration of the cross-motions for summary judgment, the memoranda, affidavits, and exhibits in support of and in opposition to said motions, the respective statements of fact as to which there is no genuine issue, the hearing on said motions, and the entire record herein, the Court makes the following findings of fact and conclusions of law:

[1] Initially, the complaint had two counts and two plaintiffs. The second count, the only count in which the second plaintiff was involved, was dismissed by stipulation of the parties filed on October 20, 1975.

BACKGROUND

David R. Merrill is a student at Georgetown University Law Center (Law Center) and a member of the Institute for Public Interest Representation (Institute), founded by the Law Center. Victor H. Kramer, who represents Merrill, is a professor at the Law Center and Director of the Institute.

Plaintiff claims that he has a strong interest in administrative law and the operation of Federal Government agencies; that he desires to study the current operations of defendant and the process by which defendant regulates the national money supply through adoption of domestic policy directives, and the extent to which defendant considers current economic and financial factors in the adoption of its domestic policy directives and other policy actions.

The defendant, Federal Open Market Committee (FOMC, the Committee), consists of the members of the Board of Governors of the Federal Reserve System and five representatives, either presidents or first vice-presidents, of Federal Reserve banks.[2] The function of the FOMC as set forth in 12 U.S.C. § 263 is to regulate the open-market operations of Federal Reserve banks. Subsection (b) of that statute provides that:

> No Federal Reserve bank shall engage or decline to engage in open-market operations under sections 353 to 359 of this title except in accordance with the direction of and regulations adopted by the Committee. The Committee shall consider, adopt, and transmit to the several Federal Reserve banks, regulations relating to the open-market transactions of such banks.

[2] 12 U.S.C. § 263(a).

Subsection (c) provides that:

> The time, character, and volume of all purchases and sales of paper described in sections 353–359 of this title as eligible for open-market operations shall be governed with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country."[3]

To carry out its statutory duties the FOMC has established a "Systems Open Market Account" for the obligations acquired pursuant to authorizations and directives issued by the Committee and held on behalf of all Federal Reserve banks.[4] Transactions for the Systems Open Market Account are executed by a Federal Reserve Bank selected by the Committee.[5]

The function and effect of open-market operations are described by Robert C. Holland, a member of the Board of Governors of the Federal Reserve System and thus of the defendant, in an affidavit (the allegations of which are undisputed) accompanying the defendant's motion for summary judgment:

> 4. Open market operations are important because of their prompt and direct influence upon the level of member bank reserves. When the Systems Open Market Account (SOMA)

[3] Sections 353–359 allow the Federal Reserve banks to deal in the open market in such papers as certain cable transfers, bankers' acceptances, bills of exchange, gold coin, bullion, obligations of National, State, and Municipal governments, and acceptances of Federal intermediate credit banks and of national agricultural credit corporations. Those sections also involve the setting of discount rates and the establishment of accounts, correspondents, and agencies.

[4] 12 C.F.R. § 270.2(d).

[5] 12 C.F.R. §§ 270.4(b), 270.4(d). A limited exception is made in (d) when the chosen bank is closed.

purchases securities in the open market, the payment is ordinarily deposited in the seller's bank and credited to that bank's reserve account in its regional Federal Reserve Bank. This process increases the total volume of bank reserves. Conversely, when the SOMA sells securities, the sales price typically is deducted from the buyer's bank's reserve account, thereby decreasing the volume of reserves held by member banks.

5. Changes in the volume of member bank reserves necessarily influence the ability of member banks to expand loans and investments. Member banks are required to hold a certain amount of reserves behind their deposits in accord with Board's Regulation D, 12 C.F.R. § 204. These banks typically respond to a lowering of reserve requirements or to a supplying of reserves through Open Market purchases by expanding loans and investments and/or selling their newly excess reserves to other member banks which are short of reserves or which need additional reserves in order to take advantage of particular lending and investment opportunities. As a result, deposits, loans and investments for the banking system expand to about the limit permitted by the required reserve ratio.

6. Changes in the availability of member bank reserves influence interest rates on money market instruments, including the Federal funds rate (the rate at which banks are willing to lend or borrow immediately available reserves on an overnight basis), and interest rates in the economy as a whole. Spending and investment by all sectors of the economy and all levels of industry tend to be influenced by the terms and conditions of obtaining credit.

Although the announced policy of the FOMC is to meet "at least four times each year and oftener if

deemed necessary"[6] the Committee typically meets once a month. The meeting agendas are described in 12 C.F.R. 272.3(e) as, in general, including

> "approval of minutes of action and acceptance of memoranda of discussion for previous meetings; reports by the manager and special manager on open market operations since the previous meeting, and ratification by the Committee of such operations; reports by economists on, and Committee discussion of, the economic and financial situation and outlook; Committee discussion of monetary policy and action with respect thereto; and such other matters as may be considered necessary."

PLAINTIFF'S REQUEST

On March 7, 1975 Victor Kramer, as Director of the Institute, sent a letter captioned "Freedom of Information Act Request" to the Secretary of the Board of Governors of the Federal Reserve System[7] requesting, on behalf of David Merrill, access to the following for purposes of inspection and copying:

> (1) Records of policy actions taken by the Federal Open Market Committee at its meeting[s] in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies.
>
> (2) Memoranda of discussion at the above meetings.

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[6] 12 C.F.R. 272.3.

[7] 12 C.F.R. § 271.4(c) requires any person seeking access to the Committee's records to request them from the Secretary of the Board.

Kramer noted that an FOMC regulation stated that the Committee's economic policy directives and related information would not be available to the public for approximately 90 days after their adoption and that this appeared to the Institute to be a violation of the Freedom of Information Act.

By letter dated March 21, 1975, Arthur L. Broida, secretary to the Federal Open Market Committee, responded to the request. With respect to the records of policy action, Broida stated that the Committee had recently determined to make those records available after 45 days rather than 90 days following the relevant meeting and that those records would then be available to the general public, including Merrill. As to those records no claim was made that they were exempt under the Freedom of Information Act. (FOIA), 5 U.S.C. 552. Regarding the memoranda of discussion, Broida stated the Committee's position that those documents were exempt under exemption (b)(5) of the Freedom of Information Act. Broida further stated that although the Committee felt the memoranda to be exempt, the Committee did release the memoranda after a time delay of approximately five years. Broida listed reasons for the time delay in releasing the memoranda of discussion including: a need for candor at the meeting on the part of the participants; a need to preclude those sophisticated in market analysis and speculators from gaining unfair profits or advantages; prevention, to the extent possible, of any interference with the orderly execution of policies or objectives of other government agencies concerned with economic or fiscal matters; and a need to preclude, to the extent possible, interference with or impairment of ongoing or prospective financial transactions with foreign banks, bankers or countries.

On March 27, 1975, Kramer wrote to Broida appealing Broida's decision as being in violation of the Freedom of Information Act, inasmuch as no exemptions were claimed for the records of policy action and that under 5 U.S.C. 552(b) and *E.P.A.* v. *Mink,* 410 U.S. 73, (1973), segregable factual portions of the memoranda of discussion were nonexempt and were subject to prompt release.

By letter dated April 23, 1975, Robert C. Holland, member of the Board of Governors of the Federal Reserve System responded. Holland enclosed all of the records of policy action (45 days having elapsed since the meetings involved). He made no claim that the records of policy were exempt under the FOIA, but stated that the delay in disclosure of these records was "founded upon a legislative policy against premature disclosures which would impair the effectiveness of the operations of Government agencies." Holland stated that he affirmed Broida's decision with respect to the memoranda of discussion as being exempt under (b)(5) of the FOIA and that they contained no segregable factual materials subject to the requirements of *E.P.A.* v. *Mink,* 410 U.S. 73, 87–93 (1973). Holland further advised that his determination was final agency action and that a complaint for judicial review could be filed.

The instant complaint was filed on May 8, 1975. Plaintiff seeks a declaratory judgment that defendant has violated the Freedom of Information Act, 5 U.S.C. § 552, by deferring the public availability of its records of policy action for 45 days beyond the date of their adoption and by delaying the public release of segregable factual portions of the memoranda of discussion of its meetings for approximately five years following the relevant meetings.

THE DOCUMENTS

a. Records of Policy Action

At each meeting of the Committee a Domestic Policy Directive is adopted. The Directive is a statement of general monetary policy in the form of guidelines for the manager of the Systems Open Market Account. Less frequently the Committee also adopts amendments to its three other policy instruments: the Authorization for Domestic Open Market Operations, the Foreign Currency Directive and the Authorization for Foreign Currency Operations.

Following each meeting the Committee's Secretariat drafts a document entitled "Record of Policy Actions."[8] The "Record of Policy Actions" consists of the records of the aforementioned policy actions adopted at the meeting, the underlying rationale therefore, and the vote of each member of the Committee thereon. The Secretariat's draft is then distributed to the participants at the meeting for their comments as to rationale, revised, and submitted to the Board of Governors for inclusion in its annual report to Congress.[9]

Pursuant to 12 C.F.R. § 271.5,[10] the Committee defers the public availability of all records of its policy actions until approximately 45 days after the meeting

[8] Plaintiff has sought all records of policy action. As is shown herein, these records exist in several forms among them the "Records of Policy Actions."

[9] If, pursuant to 12 C.F.R. § 272.4, amendments are made to the Domestic Policy Directive between meetings, those amendments, together with the reasons therefore and votes thereon, are included in the "Record of Policy Actions" for the most recent meeting.

See, 12 U.S.C. § 247a for the Board's record-keeping responsibilities.

[10] As amended, March 24, 1975, 40 Fed. Reg. 13204.

at which the actions were adopted. At that time the Domestic Policy Directive is published in the Federal Register and the "Record of Policy Actions" incorporated by reference therein and otherwise released.

b. Memoranda of Discussion

The Memoranda of Discussion are minutes of the Committee's meetings. They are drafted after a meeting, circulated to the persons who attended the meeting for comments, revised, and approved at a subsequent Committee meeting.

The FOMC releases its Memoranda of Discussion to the public after a period of approximately five years following the relevant meeting. However certain portions, mostly relating to the foreign currency area, are deleted from the released Memoranda and never made publicly available.

FREEDOM OF INFORMATION ACT

The Freedom of Information Act, 5 U.S.C. § 552, provides, *inter alia,* that:

> (a) Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and *currently publish* in the Federal Register for the guidance of the public—
>
> * * * * *
>
> (D) [S]tatements of general policy * * *
>
> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> * * * * *
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

* * * * *

unless the materials are *promptly* published and copies offered for sale.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records *promptly* available to any person. [Emphasis added]

(b) This section does not apply to matters that are—

(2) related solely to the internal personnel rules and practices of an agency;

* * * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The Freedom of Information Act thus calls for either "current publication" or "prompt" disclosure of records subject to it.

Defendant's policy of and reasons for deferring the public availability of the requested documents are expressed in 12 C.F.R. § 271.5, as amended, March 24, 1975, 40 Fed. Reg. 13204, as follows:

(a) *Deferred availability of information.* In some instances certain types of information of the Committee are not published in the Federal Register or made available for public inspection or copying until after such period of time as the Committee may determine to be reasonably necessary to avoid the effects described in paragraph (b) of this section or as may otherwise be necessary to prevent impairment of the effective discharge of the Committee's statutory responsibilities. For example, the Committee's domestic policy directive adopted at each meeting of the Committee is published in the Federal Register approximately 45 days after the date of its adoption; and no information in the records of the Committee relating to the adoption of any such directive is made available for public inspection or copying before it is published in the Federal Register or is otherwise released to the public by the Committee.

(b) *Reasons for deferment of availability.* Publication of, or access to, certain information of the Committee may be deferred because earlier disclosure of such information would

(1) Interfere with the orderly execution of policies adopted by the Committee in the performance of its statutory functions;

(2) Permit speculators and others to gain unfair profits or to obtain unfair advantages by speculative trading in securities, foreign exchange, or otherwise;

(3) Result in unnecessary or unwarranted disturbances in the securities market;

(4) Make open market operations more costly;

(5) Interfere with the orderly execution of the objectives or policies of other Government agencies concerned with domestic or foreign economic or fiscal matters; or

(6) Interfere with, or impair the effectiveness of, financial transactions with foreign banks, bankers, or countries that may influence the flow of gold and of dollar balances to or from foreign countries.

The Supreme Court stated in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975):

It is sufficient to note for present purposes that the [Freedom of Information] Act seeks

> "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." * * * As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions. (citations omitted).

The burden is on the agency to establish that the requested information falls within one of the exceptions.[11] This Court finds that defendant has not succeeded in carrying its burden.

The Committee attempts to justify the deferred availability of the records of its policy actions by asserting that they are exempt from the FOIA by subsections (b)(2) (Exemption 2) and (b)(5) (Exemption 5) of the Act. The only exemption briefed for and argued at the hearing was Exemption 5. It was only in a motion to amend the Court's findings at the hearing that the FOMC, for the first time, saw fit to raise Exemption 2. The apparent theory of the Committee's position is that the documents need not be released at all and the fact that they do release them 45 days after the meeting at which they were adopted (or to which they relate in the case of the "Records of Policy Actions") is due solely to the Committee's benevolence.

Exemption (2), belatedly claimed by the Committee for its records of policy actions, provides:

> (b) this section does not apply to matters that are—
>
> (2) related solely to the internal personnel rules and practices of an agency.

[11] 5 U.S.C. § 552(a)(4)(B).

The District of Columbia Circuit Court of Appeals dealt with this subsection in *Vaughn* v. *Rosen*, 523 F. 2d 1136 (D.C. Cir. 1975). The majority of the Court found that the intent of Congress was reflected in the Senate Report as follows:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.[12]

The Court then stated:

> [W]e are of the view that the Senate Committee Report is authoritative and that Exemption 2 exempts from disclosure only routine 'house-keeping' matters in which it can be presumed the public lacks any substantial interest.[13]

Defendant's records of policy actions are clearly not "housekeeping" matters. Exemption 2 does not apply.

In his concurring opinion in *Vaughn,* Judge Leventhal stated that:

> It seems unlikely that the (b)(2) exemption is applicable only to the kind of routine or trivial agency personnel policies and practices itemized in the Senate Report. *But even so the exemption is limited to predominately "internal personnel rules and practices of an agency."*[14] (Emphasis added)

The nature of the documents together with defendant's vigorous arguments concerning the influence of the

[12] 523 F. 2d at 1140–41.

[13] *Id.*, at 1141.

[14] 523 F. 2d at 1151.

policy decisions of the FOMC upon the nation's economic status and the fact that the documents are publicly released on a deferred basis, demonstrate that even under Judge Leventhal's broader view, defendant's contention that Exemption 2 applies is without merit.

The other exemption claimed by the defendant for its records of policy actions, Exemption 5, provides:

> (b) This section does not apply to matters that are—
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

In *NLRB* v. *Sears, Roebuck & Co., supra,* the Supreme Court found it

> reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context.[15]

Defendant herein relies upon executive privilege[16] recognized by the *Sears* court as having been specifically contemplated by Congress in enacting Exemption 5.[17] Finding that the ultimate purpose of executive privilege is to prevent injury to agency decisions, the Supreme Court determined that:

> Exemption 5, properly construed, calls for "disclosure of all opinions and interpretations" which embody the agency's effective law and policy, and withholding of all papers which

[15] 421 U.S. at 149 (footnote omitted).

[16] Executive privilege is the generally recognized privilege for confidential intra-aency advisory opinions disclosure of which would be injurious to the consultative functions of government. *Id.*

[17] *Id.* at 150.

> reflect the agency's group thinking in the process of working out its policy and determining what its law shall be."[18]

In *Vaughn* v. *Rosen, supra,* our Court of Appeals expressed the thought this way:

> [T]o come within the privilege [for confidential intra-agency advisory opinions disclosure of which would be injurious to the consultative functions of government] and thus within Exemption 5, the document must be a direct part of the deliberative process in that it make recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be part of the agency give-and-take—of the deliberative process—by which the decision itself is made.[19]

Defendant's assertions that its records of policy actions are exempt under Exemption 5 rest on the specific holding of the Supreme Court as to the documents sought under the FOIA in the *Sears* case. *Sears* involved Advice and Appeals Memoranda by which, in certain instances, the General Counsel of the National Labor Relations Board (NLRB) instructs the Board's Regional Directors whether to file charges of unfair labor practices. The Supreme Court held that the Memoranda which conclude that no complaint should be filed and which have the effect of finally denying relief to the charging party are not within the scope of Exemption 5. However, those Memoranda directing the filing of a complaint and commencing litigation before the Board are exempt from disclosure under Exemption 5.

[18] 421 U.S. at 153.

[19] 523 F. 2d at 1143–44.

Defendant herein, analogizing its records of policy actions to the Advice and Appeals Memoranda which direct the filing of a complaint, argues that its records of policy actions are pre-decisional instructions to its staff and thus exempt under executive privilege.[20]

The Court finds that the FOMC has misread *Sears*. In addition to executive privilege the *Sears* court found that Congress had intended to incorporate the attorney's work product privilege into Exemption 5.[21] The Supreme Court made clear that the Advice and Appeals Memoranda directing the filing of complaints are within Exemption 5 only because they are attorney's work product.[22] Since defendant has not raised the attorney's work product privilege with respect to its records of policy actions, its reliance on this holding in *Sears* is misplaced.

The Court finds no basis for the FOMC's assertion that its records of policy actions are within the executive privilege aspect of Exemption 5. Defendant's records of policy actions are not papers which reflect the Committee's group thinking in the process of working out its policy and determining what its law shall be. Defendant's records of policy actions are not pre-decisional nor part of the agency give-and-take—

[20] Defendant's Reply Memorandum Statement, at 7, 8. Transcript of hearing at 15–20 and 22.

[21] 421 U.S. at 154.

[22] Id., at 160.

This is consistent with 5 U.S.C. § 552(a)(2)(C) which makes "instructions to staff that affect a member of the public" specifically disclosable, as the act does not apply to documents exempt under subsection (b), including Exemption 5. Whether defendant's assertions that its Domestic Policy Directives are staff instructions makes the Directives subject to subsection (a)(2)(C) is a question not raised by plaintiff and which the Court finds unnecessary to reach.

of the deliberative process—by which the decisions themselves are made. Defendant's records of policy actions *are the decisions themselves,* and, in the case of the "Records of Policy Actions", also the rationale therefor.[23] Defendant's records of policy actions *are* the embodiment of the FOMC's effective law and policy. Moreover, the point of executive privilege

> is that the 'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and the 'decisions' and 'policies formulated' would be the poorer as a result.[24]

Assuming *arguendo* that defendant's records of policy actions contain pre-decisional, deliberative material, the regular voluntary public release of the records by the FOMC approximately 45 days after each meeting indicates that there would be no point in applying executive privilege to these documents. Defendant has not sustained its burden of proving that its records of policy actions are exempt from disclosure under Exemption 5.

The Court's findings that defendant's records of policy actions are not exempt from the FOIA by subsection (b)(2) or (b)(5) of the Act are supported, if not compelled, by defendant's own interpretations of its records of policy actions. The Press Release of March 24, 1975,[25] announcing that the Committee had

[23] "[T]he public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted." *Id.*, at 152.

[24] *Id.*, at 150.

[25] Attachment A to Defendant's Statement of Points and Authorities in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment.

shortened the delay in the release of the records contains the following:

> A delay of approximately 90 days had been in effect since mid-1967 when the rules were changed to comply with the Freedom of Information Act. Prior to 1967, the records of policy actions were published only in the Board's Annual Report to Congress.

Obviously the Committee considered its records of policy actions to be subject to and not exempt from the Freedom of Information Act or it would not have found it necessary to change its disclosure policy to comply with the Act.

Furthermore, when plaintiff sought defendant's records of policy actions under subsection (a)(3) in his complaint and then additionally under subsection (a)(2) in his motion for summary judgment, the defendant responded:

> The FOMC's Domestic Policy Directive, which is quoted verbatim in each Record of Policy Actions, should be regarded as a statement of general policy within the meaning of 5 U.S.C. § 552(a)(1)(D). This conclusion is supported by 40 years of practice of the FOMC and the Board of Governors in submitting policy records to Congress each year, by the provisions of 12 U.S.C. § 247, and more recently by the practice of publishing the Directive and referencing the Records of Policy Actions in the *Federal Register*. To be sure, such a classification places a more onerous burden on the FOMC than the classification suggested by Plaintiffs, since publication is required.[26] (Footnote omitted.)

[26] Defendant's "Statement of Points and Authorities in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment" at 16.

The Court has no difficulty in accepting the FOMC's position that the Domestic Policy Directives are not exempt from the FOIA but are statements of general policy within the meaning of subsection (a)(1)(D).

Furthermore, since the "Records of Policy Actions" are incorporated by reference in the defendant's statements in the Federal Register they are not exempt from disclosure but must be promptly disclosed when finally adopted.[27] In *Sears, supra,* the Supreme Court made this statement:

> [W]e hold that, if an agency chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would wotherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.[28] (Emphasis in original)

By being expressly incorporated by reference in the Domestic Policy Directive, the Records of Policy Actions lose whatever exempt status that they might have had under Exemption 5. And, as noted above, the only other exemption claimed by the Committee for the "Records of Policy Actions," *i.e.,* Exemption 2, clearly does not apply.

This Court can find no basis for the claim of the FOMC that it may withhold its records of policy actions for 45 days or the "Records of Policy Actions" after their approval on the grounds that they are exempt from the FOIA and their revelation a magnanimous gesture by the agency.

[27] Plaintiff has not sought a determination that the other policy actions must themselves be published in the Federal Register and the Court finds it unnecessary to reach the question.

[28] 421 U.S. at 161.

The Court therefore finds that defendant's Domestic Policy Directives are subject to 5 U.S.C. § 552 (a)(1)(D) as statements of general policy. The Court further finds that defendant's policy actions other than the Domestic Policy Directives are subject to 5 U.S.C. § 552(a)(2)(B) as statements and interpretations of policy which have been adopted by the agency and are not published in the Federal Register. Additionally, the Court finds that those portions of the documents entitled "Records of Policy Actions" that contain other than statements and interpretations of policy are subject to the Act's catch-all provision, 5 U.S.C. § 552(a)(3).

There remains the question as to whether the release of the documents by the FOMC 45 days after the meeting as which the policy actions are adopted and to which the "Records of Policy Actions" relates, is "current" or "prompt" disclosure within the meaning of subsections (a)(1), (a)(2), and (a)(3) of the Act.

Again, accepting the FOMC's position that the Domestic Policy Directive is a statement of general policy within the meaning of Subsection (a)(1)(D), the FOMC is required to "separately state and currently publish" the Directive in the Federal Register. The Court finds that the requirements of (a)(1)(D) that statements of general policy be "currently published" in the Federal Register requires that such publication be made as soon as possible with no delay other than that occasioned by the normal process of publication in the Federal Register. By delaying the publication of the Domestic Policy Directive until 45 days after the meeting at which it was adopted and after another Domestic Policy Directive has been adopted, the FOMC *never currently publishes* its Do-

mestic Policy Directives but rather publishes one which is outdated. Obviously a delay of 45 days does not satisfy the statutory requirement to "currently publish".

Subsection (a)(2)(B) of the FOIA requires that statements and interpretations of policy not currently found in the Federal Register be made available for public inspection and copying unless "promptly published". For publication to be prompt so as to obviate the responsibility of the agency to make its records available for public inspection and copying there can be no attendant delay other than that occasioned by the normal publication process. If the "general philosophy of full agency disclosure" [29] mandated by the FOIA is to be realized, agencies may not be allowed to otherwise delay the public release of its documents.

The Freedom of Information Act contemplates public disclosure of current agency policy and not merely past policy. Defendant's practice of withholding its present policy records from the public for 45 days during the time the policy may be superseded is clearly contrary to the purposes of the Freedom of Information Act. A 45 day delay cannot be equated with "promptness."

Similarly the Court finds that those portions of the "Records of Policy Actions" subject to subsection (a)(3) must be released at the time of their approval in order to satisfy the requirement of the subsection that such records be made "promptly available."

In addition to the records of policy discussed above, plaintiff, in his complaint, sought "some or all" of the memoranda of discussion of defendant's meetings of January 20–21, 1975, and February 19, 1975. How-

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[29] *NLRB* v. *Sears, Roebuck & Co., supra*, at 136.

ever, at the hearing on the cross-motions for summary judgment, plaintiff stated that he sought only those parts of the memoranda

> that contain segregable, discreet statements of fact, rather than statements of opinion for deliberation.[30]

Although FOMC releases the entire memoranda of discussion after approximately five years, defendant claims that its entire memoranda of discussion are exempt from the FOIA by subsection (b)(5) of the Act. However, subsection (b) as amended, 1974, provides:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of those portions which are exempt under this subsection.

In *EPA* v. *Mink,* 410 U.S. 73, 91 (1973), the Supreme Court stated:

> It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies. And, as noted, *that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the document.* (Emphasis added)

Plaintiff is entitled to the reasonably segregable factual portions of the memoranda of discussion of de-

[30] Transcript of hearing, page 5.

fendant's meetings of January 20–21, 1975, and February 19, 1975.[31]

In finding that the FOMC may not delay the public disclosure of its records of policy actions nor the factual portions of its memoranda of discussion, the Court is not unmindful of the repeated insistence by the Committee that such disclosure would be injurious to its function and the nation's monetary and economic status. But the Freedom of Information Act requires prompt disclosure of non-exempt materials. FOMC has not satisfied the Court that the records sought in this proceeding are exempt from disclosure under any exemption in the Statute as enacted by Congress. If it is necessary for the FOMC to carry out its monetary policy in secrecy then that determination must be made by Congress and not this Court.

CONCLUSIONS

Upon consideration of all of the foregoing the Court concludes that none of the reasons given in 12 C.F.R. § 271.5(b) for the deferred availability of information requested by plaintiff constitutes an exemption under subsection (b) of the Freedom of Information Act. 5 U.S.C. § 552.

Specifically, defendant's records of its policy actions are not exempt under subsection (b)(2) or (b)

[31] Defendant's repeated reliance on *Montrose Chemical Corp. of California* v. *Train,* 491 F. 2d 63 (D.C. Cir. 1974) is misplaced. In that case assistants prepared a summary of record evidence for use by the administrator in reaching a decision. The Court held that: "When a summary of factual material on the public record is prepared by the staff of an agency administrator, for his use in making a complex decision, such a summary is part of the deliberative process, and is exempt from disclosure under exemption 5 of FOIA." *Id.,* at 71. Defendant FOMC does not make a public record. Rather its meetings are held in secret and the contents revealed only after five years.

(5) of the Freedom of Information Act but are subject to the disclosure requirements of subsection (a) of the Act.

Defendant's Domestic Policy Directive is a statement of general policy which must be currently published in the Federal Register in accordance with subsection (a)(1)(D) of the Act.

Defendant's other policy actions are subject to subsection (a)(2) of the Act and in accordance with that subsection must be made available for public inspection and copying unless promptly published.

The portions of defendant's "Records of Policy Actions" that are not statements or interpretations of policy are subject to subsection (a)(3) of the Act and must be promptly made available after approval in accordance with the provisions of that subsection.

Reasonably segregable factual portions of defendant's memoranda of discussion of its meetings of January 20–21, 1975, and February 19, 1975, are not exempt from the Freedom of Information Act by subsection (b)(5) of the Act but are subject to the prompt disclosure requirements of subsection (a)(3) of the Act.

Inasmuch as there is no genuine issue of material fact, an order and judgment will be entered herein granting plaintiff's motion for summary judgment and denying defendant's cross-motion.

At the conclusion of the hearing on the cross-motions for summary judgment, counsel for the defendant requested the Court to stay that portion of its order relating to the records of policy action in order that defendant might exercise its right of appeal. The Court denied the request. Upon reconsideration and in view of defendant's vigorous representations as to the serious adverse consequences to its functioning and the nation's monetary policies and economy, the Court will now grant defendant's request and stay that portion of its Order requiring immediate production of its records of policy action for 10 days to allow defendant to exercise its right of appeal. If appeal is taken the stay will remain in effect pending the disposition of the appeal.

JOSEPH C. WADDY,
United States District Judge

Date: March 9, 1976

U.S. GOVERNMENT PRINTING OFFICE: 1979

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1387

THE FEDERAL OPEN MARKET COMMITTEE
OF THE FEDERAL RESERVE SYSTEM,
Petitioner

—*v.*—

DAVID R. MERRILL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MARCH 29, 1978
CERTIORARI GRANTED MAY 22, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1387

THE FEDERAL OPEN MARKET COMMITTEE
OF THE FEDERAL RESERVE SYSTEM,
Petitioner

—*v.*—

DAVID R. MERRILL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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DAVID R. MERRILL
JOHN A. JENKINS

v.

FEDERAL OPEN MARKET COMMITTEE
OF THE FEDERAL RESERVE SYSTEM

RELEVANT DOCKET ENTRIES

DATE	NR.	
1975		
May	08	COMPLAINT; Appearance; Exhibits A, B, C & D.
May	08	SUMMONS Copies (3) and Copies (3) of Complaint issued. (U.S. Atty. Ser. 5-12, AG Ser. 5-9-75 (Deft. Ser. 5-15)
Jun.	9	ANSWER of deft. to complaint; c/m 6-9-75.
Jun.	9	CALENDARED CD/N.
Sept.	24	MOTION of plaintiffs for summary judgment; affidavits; appendixs A & B; statement of material facts; P & A; Exhibit A c/s 9-24-75.
Oct.	8	MOTION by deft. for enlargement of time to file opposition to motion for summary judgment; P&A; c/s 10-7-75.
Oct.	20	STIPULATION dismissing without prejudice the second claim in complaint extending time to 10-24-75 for deft. to file opposition to motion for summary judgment. APPROVED. (N) Waddy, J.
Oct.	24	MOTION by defts. for summary judgment; Exhibits A thru G; c/m 10-24.
Oct.	24	STATEMENT by defts. of material facts as to which there is no dispute; c/m 10-24.
Oct.	24	OPPOSITION by defts. to pltffs. statement of material facts which are not in issue; c/m 10-24.
Oct.	24	STATEMENT of P & A's by defts. in support of motion for summary judgment and in opposition to pltffs. motion for summary judgment; attachments A & B; c/m 10-24.

DATE NR.

1975

Nov. 6 STIPULATION extending time to 11-10-75 for Pltff to respond to motion for summary judgment, approved. (N)

Nov. 10 MEMORANDUM of pltf. in opposition to deft's motion for summary judgment; Appendix "A"; c/m 11/10/75.

Nov. 10 RESPONSE of pltf. to deft's statement of material facts which are not in issue; c/m 11/10/75.

Dec. 24 REPLY Memorandum of deft.; c/m 12/24/75.

1976

Jan. 20 SUPPLEMENT of deft. to motion for summary judgment; Supplemental Affidavit of Arthur L. Broids; c/m 1/20/76.

Jan. 29 CROSS-motions for summary judgment, heard and granted as to pltf.; Oral motion of deft. for stay, heard and denied; pltf. has 7-days to file memorandum on counsel fees; deft. has 5-days to respond. (OTBP) (Rep: V. Marshall) WADDY,J.

Jan. 30 SUGGESTION by deft. of entry of proposed order by deft.; attachment; c/s 1-30-76.

Jan. 29 TRANSCRIPT of proceedings of 1-29-76, pp. 1-36; Rep: V. Marshall.

Feb. 03 MOTION of deft. to amend findings; P&A's; c/s 2-3-76.

Feb. 05 MEMORANDUM of pltf. in reply to motion of deft. to amend findings; c/s 2-5-76.

Feb. 05 MOTION of pltf. for award of reasonable attorney fees and litigation costs; affidavits (2); P&A's; c/s 2-5-76.

DATE NR.

1976

Feb. 12 MEMORANDUM of deft. in opposition to motion of pltf. for award of reasonable attorney fees and litigation costs; exhibits A-C; c/m 2-12-76.

Feb. 25 SUPPLEMENT to motion of deft. to amend findings; affidavit of Robert C. Holland; c/m 2-25-76.

Feb. 27 RESPONSE of pltf. to supplement by deft. to motion of deft. to amend findings; c/m 2-27-76.

Mar. 09 MEMORANDUM Opinion. (N) WADDY,J.

Mar. 09 ORDER and Judgment granting motion of pltf. for summary judgment; denying motion of deft. for summary judgment; directing defts. to submit for in camera inspection within 10-days non-segregable memorandum of discussion; denying motion of deft. to amend findings; granting motion of deft. to stay as far as Paragraphs 5, 6, 7 & 8 of this order; holding in abeyance prayer of pltf. for counsel fees pending disposition of appeal. (N) (See order for details) WADDY,J.

Mar. 16 NOTICE of Appeal by deft. from Order of 3-9-76. Copy mailed to Victor H. Kramer. No fee—U.S. Govt.

Mar. 18 MOTION by deft. for enlargement of time; P&A's; c/m 3-18.

Mar. 19 SUPPLEMENT by deft. to motion of deft. for enlargement of time; c/m 3-19-76.

Mar. 22 ORDER filed 3-19-76 granting motion of deft. extension of time to comply with Paragraph 10 of order of 3-9-76 to 3-24-76. (N) WADDY,J.

Mar. 24 REPORT by deft. to the Court; affidavit of Arthur L. Broida; exhibits A & B to affidavit of Broida filed in camera; c/m 3-24-76.

Apr. 05 MEMORANDUM of pltf. in response to report of deft. to the Court; c/m 4-5-76.

DATE NR.

1976

Apr. 22 RECORD on Appeal delivered USCA; receipt acknowledged (#76-1379).

Aug. 02 ORDER filed 7-30-76 directing parties to appear for hearing on August 11, 1976 at 11:00 A.M. in re in camera submissions and motion of pltf. for attorneys fees. (N) WADDY,J.

Aug. 06 STATUS HEARING: re *in camera* submissions and attorney's fees set for 11:00 A.M. on August 11, 1976 continued until 10:00 A.M. on September 28, 1976. (Rep: Vernell Marshall) WADDY,J.

Oct. 06 ORDER filed 10-5-76 directing deft. to release memorandum of discussion of January 20 & 21, 1975 and February 19, 1975 within 10-days. (N) WADDY,J.

Oct. 15 NOTICE of Appeal by deft. from Order of 10-5-76. Copy mailed to Victor H. Kramer. No fee—U.S. Govt.

Oct. 15 MOTION by deft. for stay of Order of 10-5-76; P&A's exhibit A; c/m 10-15-76.

Oct. 19 MEMORANDUM of deft. concerning motion of deft. for stay; c/m 10-19-76.

Oct. 26 ORDER filed 10-22-76 granting motion of deft. for stay; staying order of 10-5-76 pending appeal. (N) WADDY,J.

Nov. 19 RECORD on Appeal delivered USCA; receipt acknowledged (#76-2047).

1977

Jan. 19 CERTIFIED copy Order USCA granting joint motion to remand the record and the record herein is remanded to the USDC; Clerk of the District Court is requested to promptly return the record to this Court upon completion of the remand proceedings.

DATE NR.

1977

Jan. 19 LETTER from George A. Fisher to James F. Davey remanding certified original record to USDC. (Jacket submitted to Judge Waddy 1-24-77)

Mar. 18 JOINT Report to the Court; exhibits A & B.

Mar. 23 STIPULATION and ORDER filed 3-22-77 striking second prayer for relief with prejudice and without prejudice to pltf. to obtain an award for costs in re any portion of complaint. (N) WADDY,J.

Mar. 24 SUPPLEMENTAL Record on Remand & Return of Original Record to USCA; receipt acknowledged (#76-2047).

Apr. 21 CERTIFIED copy ORDER USCA dismissing appeal.

May 9 ORDER filed May 6, 1977 directing *sua sponte* that the parties shall, on or before 5-20-77, file; memoranda of law and setting case for hearing on motion of pltff. for award of reasonable attorney fees & litigation costs on 6-1-77 at 10:00 A.M. (N) Waddy,J.

May 19 MOTION by deft. to amend order of May 5, 1977; c/m 5-19-77.

May 19 MEMORANDUM of Law by pltfs. on attorney fees in response to the Court's request of May 5, 1977; attachments (2); c/m 5-19-77.

May 23 ORDER filed 5-20-77 extending time to 15-days after decision in USCA 76-1379 for defts. to file brief as directed in order of 5-5-77; vacating status call set for 6-1-77. (N) WADDY,J.

July 20 TRANSMITTAL Sheet from USCA returning to USDC the original record (remaining papers) and one supplemental record containing remand proceedings.

Nov. 25 MEMORANDUM of deft. in response to order of May 5, 1977; c/m 11-25-77.

DATE	NR.	
1977		
Dec.	01	RESPONSE of pltf. to memorandum of deft. in opposition to motion of pltf. for award of reasonable fees and litigation costs; c/m 12-1-77.
1978		
Feb.	24	Copy of Order USCA granting motion of appellant for further stay of mandate and the Clerk is directed not to issue the mandate in this case prior to March 13, 1978.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0736

DAVID R. MERRILL
1454 North Beauregard Street
Alexandria, Virginia 22311
703-671-2894, and

JOHN A. JENKINS
7515 Hogarth Street
North Springfield, Virginia 22151
703-256-8248, PLAINTIFFS

v.

FEDERAL OPEN MARKET COMMITTEE
OF THE FEDERAL RESERVE SYSTEM
20th and Constitution Avenue, N.W.
Washington, D.C. 20551, DEFENDANT

COMPLAINT

This suit for declaratory and injunctive relief is brought under the Freedom of Information Act ("FOIA") and the Administrative Procedure Act. It seeks an order prohibiting the enforcement by defendant Federal Open Market Committee of the Federal Reserve System ("FOMC") of 12 C.F.R. § 271.5, which provides for delays in the public disclosure of nonexempt FOMC records, and an order requiring defendant FOMC to make available the memoranda of discussion of certain FOMC meetings.

JURISDICTION AND VENUE

1. This Court has jurisdiction of this action pursuant to the provisions of 5 U.S.C. § 552, 5 U.S.C. §§ 701-706, and 28 U.S.C. § 1361, and is empowered to give relief by those statutes and additionally by 28 U.S.C. § 2201, 2202.

2. Defendant FOMC is found in the District of Columbia, and the agency records sought are situated in the District of Columbia.

PARTIES

3. Plaintiff David R. Merrill is a law student at Georgetown University Law Center and a member of the Institute for Public Interest Representation which has offices at 600 New Jersey Avenue, N.W., Washington, D.C. 20001. He resides in Alexandria, Virginia, and is a person within the meaning of 5 U.S.C. § 551(2). Plaintiff Merrill, in his course of studies at the Institute, has developed a strong interest in administrative law and the operation of agencies of the federal government. His course of study now is devoted exclusively to these two subjects, and he intends to continue this study throughout his professional career. In particular, plaintiff Merrill is attempting to study and desires to study the current operations of defendant FOMC. He is interested in studying the process by which the FOMC regulates the national money supply through the frequent adoption of domestic policy directives and is particularly interested in how and to what extent current economic and financial factors are taken into consideration by the FOMC in the adoption of its domestic policy directives and other policy actions.

4. Plaintiff John Jenkins resides in North Springfield, Virginia, and is a person within the meaning of 5 U.S.C. § 551(2). Plaintiff Jenkins is a Washington reporter covering financial and economic affairs, including the policies of defendant FOMC and its forecasts of economic activity. As a professional journalist regularly reporting on current national economic affairs, plaintiff Jenkins has a strong interest in and a continuing and immediate need for information about the present activities of defendant FOMC as it directs national monetary policy.

5. Defendant FOMC is an agency of the United States government within the meaning of 5 U.S.C. § 551(1) and of 5 U.S.C. § 552(e) and is located in the District of Columbia.

FIRST CLAIM FOR RELIEF

As a first claim for relief, plaintiff Merrill alleges the following:

6. By letter dated and delivered on March 7, 1975, plaintiff Merrill requested defendant FOMC, pursuant to the FOIA, to provide him with access to the following reasonably described records in its possession:

> (a) records of policy actions taken by the Federal Open Market Committee at its meetings in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies, and
>
> (b) memoranda of discussion at the above meetings.

A copy of this letter is attached hereto as Exhibit A.

7. By letter dated March 21, 1975, and signed by Arthur L. Broida, Secretary to the FOMC, defendant FOMC denied plaintiff Merrill prompt access to the records described in paragraph 6. With regard to the records described in paragraph 6(a), the sole basis stated for the denial was defendant FOMC's "determination" that said records be made available to the public on a "time-delay basis." Defendant FOMC's regulation, 12 C.F.R. § 271.5, *as amended*, 40 Fed. Reg. 13204 (Mar. 25, 1975), provides for a 45-day delay in the release of records of this type. With regard to the records described in paragraph 6(b), the stated basis for denial was exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). A copy of this letter, without enclosures, is attached hereto as Exhibit B.

8. By letter dated and delivered March 27, 1975, plaintiff Merrill appealed this denial pursuant to 12 C.F.R. § 271.4. In this letter plaintiff Merrill claimed that the bases for denial, as stated in paragraph 7, were legally insufficient; that delayed disclosure of the records described in paragraph 6(a) was unlawful under the FOIA; and that even if exemption 5 of the FOIA applied to some portions of the records described in paragraph 6(b),

the nonexempt portions of those records were required to be disclosed. A copy of this letter is attached hereto as Exhibit C.

9. By letter dated April 23, 1975, and signed by Robert C. Holland, a member of the Board of Governors of the Federal Reserve System and a member of defendant FOMC, defendant FOMC responded to plaintiff Merrill's appeal. Defendant FOMC provided plaintiff Merrill with copies of the records requested in paragraph 6(a), 45 days now having elapsed since the dates of the January and February 1975 FOMC meetings. Defendant FOMC stated that the delay in disclosure of these and similar records was "founded upon a legislative policy against premature disclosures which would impair the effectiveness of the operations of Government agencies." With regard to the records requested in paragraph 6(b), defendant FOMC affirmed its initial denial of access pursuant to exemption 5 of the FOIA, 5 U.S.C. § 552 (b)(5), and further stated that these records contained no factual materials which were required to be segregated and disclosed. A copy of this letter, without enclosures, is attached hereto as Exhibit D.

10. 12 C.F.R. § 271.5, insofar as it provides that the records, or any part thereof, of policy actions of defendant FOMC may or shall be withheld from public disclosure for a period of approximately 45 days after the date of adoption, is in contravention of the FOIA and is therefore invalid.

11. Defendant FOMC's practice of releasing on a time-delay basis records of policy actions of the FOMC violates the FOIA's requirement of prompt disclosure. 5 U.S.C. § 552(a)(3).

12. Defendant FOMC's denial of plaintiff Merrill's request for access to the records described in paragraph 6(b) is unlawful. The FOIA requires that some or all of said records be disclosed.

SECOND CLAIM FOR RELIEF

As a second claim for relief, plaintiffs Merrill and Jenkins allege the following:

13. Paragraphs one through five of this complaint are incorporated herein by reference.

14. Plaintiff Merrill is aggrieved and injured in his course of study of current FOMC operations by defendant FOMC's regulation, 12 C.F.R. § 271.5, insofar as it provides for a 45-day delay in the release of records of policy actions of defendant FOMC, and by defendant FOMC's practice of releasing said records on a time-delay basis, as a result of which he is unable to obtain prompt access to said records.

15. Plaintiff Jenkins is aggrieved and injured as a reporter and journalist by defendant FOMC's regulation, 12 C.F.R. § 271.5, insofar as it provides for a 45-day delay in the release of records of policy actions of defendant FOMC and a delay in the release of other nonexempt FOMC records, and by defendant FOMC's practice of releasing said records on a time-delay basis, as a result of which he is unable to obtain prompt access to said records.

16. 12 C.F.R. § 271.5, insofar as it provides that the records, or any part thereof, of policy actions of defendant FOMC may or shall be withheld from public disclosure for a period of approximately 45 days and insofar as it provides that any other nonexempt FOMC records may be temporarily withheld from public disclosure, is in contravention of the FOIA and is therefore invalid.

17. Defendant FOMC's practice of releasing on a time-delay basis records of policy actions of the FOMC and other nonexempt FOMC records violates the FOIA's requirement of prompt disclosure. 5 U.S.C. § 552(a)(3).

PRAYER

WHEREFORE, having no adequate remedy at law, plaintiffs pray that this Court enter a judgment:

(1) declaring that 12 C.F.R. § 271.5, insofar as it provides for a delay in the public disclosure (a) of records of policy actions of defendant FOMC, and (b) of other nonexempt FOMC records, is in contravention of the FOIA and is therefore invalid;

(2) ordering defendant FOMC to make the records, or the nonexempt portions thereof, described in paragraph 6(b) promptly available to plaintiff Merrill;

(3) ordering defendant FOMC to cease enforcement of 12 C.F.R. § 271.5, insofar as that regulation provides for any delay in the public disclosure (a) of records of policy actions of defendant FOMC, and (b) of other nonexempt FOMC records, and promptly to disclose said records upon the request of any person; and

(4) granting such other and further relief, including reasonable attorney fees and other litigation costs of plaintiff Merrill in bringing this action, as may be just and proper.

/s/ Victor H. Kramer
VICTOR H. KRAMER

/s/ Richard B. Wolf
RICHARD B. WOLF

/s/ Charles E. Hill
CHARLES E. HILL

/s/ Robert C. Brown
ROBERT C. BROWN

Institute for
Public Interest Representation
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
624-8390

Counsel for Plaintiffs

EXHIBIT A

INSTITUTE FOR PUBLIC INTEREST
REPRESENTATION
GEORGETOWN UNIVERSITY LAW CENTER

March 7, 1975

FREEDOM OF INFORMATION ACT REQUEST

Secretary of the Board
Board of Governors of the
Federal Reserve System
Federal Reserve Building
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Dear Sir:

On behalf of David R. Merrill, a student at Georgetown University Law Center, we hereby request access, for purposes of inspection and copying, to the following:

(1) Records of policy actions taken by the Federal Open Market Committee at its meetings in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies.

(2) Memoranda of discussion at the above meetings.

The Freedom of Information Act, 5 U.S.C. § 552(a)(6)(A)(i), requires that this request be determined within 10 working days. We note that the Federal Open Market Committee regulation, 12 C.F.R. § 271.5, states that the Open Market Committee's economic policy directives and related information will not be made available to the public for approximately 90 days after their adoption. In our opinion this part of this regulation violates the Act.

If responding to our request will result in our being assessed a fee in excess of twenty dollars, we ask that

you communicate with us before proceeding to respond to the request.

Sincerely,

/s/ Victor H. Kramer
VICTOR H. KRAMER
Director

EXHIBIT B

[SEAL]

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
Washington, D.C. 20551

March 21, 1975

Victor H. Kramer, Esq.
Director
Institute for Public Interest
Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C.

Dear Mr. Kramer:

This acknowledges your letter of March 7, 1975, which you state to be a "Freedom of Information Act request", wherein you ask, on behalf of Mr. David R. Merrill, for access to the following documents:

(1) Records of policy actions taken by the Federal Open Market Committee at its meeting in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies.

(2) Memoranda of discussion at the above meetings.

Regarding your request for records of policy actions for the meetings of January and February 1975, the Federal Open Market Committee has recently determined that all records of policy actions will be made available to the public on a time-delay basis substantially shorter than that currently applicable, namely, 90 days after the date of a meeting. Pursuant to this determination, the record of policy actions for the Committee meeting of January 1975 will be available to the public, including Mr. Merrill, on Monday, March 24, 1975. The record of

policy actions with respect to the Committee's February 1975 meeting will be available to the public, including Mr. Merrill, on or about April 7, 1975. Both records will be the subject of a Federal Reserve press release and can be obtained on the dates mentioned at the Board's Public Affairs Office, Room 2121, 20th and Constitution Avenue, N.W., Washington, D.C.

As to Mr. Merrill's request for memoranda of discussion at the January and February 1975 meetings, it is the Committee's position that these memoranda are exempt from the disclosure requirements of the Freedom of Information Act, pursuant to 5 U.S.C. § 552(b)(5). This provision removes from the application of the Act "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The Committee is of the view that its conclusion as to the exempt status of its memoranda of discussion is firmly supported by the criteria of subsection (b)(5), the legislative history of the Act as originally enacted, and the Attorney General's memorandum on the Public Information Section of the Administrative Procedure Act, dated June 1967.

Notwithstanding the exempt status of the memoranda of discussion, the Committee has made such memoranda available to the public after a lapse of time deemed by the Committee sufficient to preclude serious adverse consequences attending premature release. Historically, memoranda of discussion for an entire year of Committee meetings are made available to the public in a single release. Thus, as exemplified in the enclosed Federal Reserve release of January 27, 1975, minutes of discussions and actions at the meetings of the Committee during 1969 were transferred to the National Archives on that date and simultaneously made available to the public, with the exception of certain deletions of matter identified in the minutes released. At present, the time lag for transfer to the National Archives is approximately five years following the close of the year in question. It should be noted that the lag period adopted is discretionary with the Committee and is subject to review

and change by that body. Any change in the present lag schedule would, of course, be made known by appropriate press release action accompanying transfer of the memoranda to the National Archives. As such transfer is made, the material in question is simultaneously available at the Board's office and the Federal Reserve Bank of New York.

Appropriate at this point would be a brief reference to the Committee's rationale for deferring for a substantial period release of the memoranda of discussion. The imposition of such time lag is premised, in part, upon the following considerations:

(1) A need to bring into the decision-making processes of the Committee uninhibited expression of the broadest range of individual opinions and advice. In every area of Federal Government operation—executive, legislative and judicial, the principle is widely recognized that internal deliberations, including intra-organizational advisory opinions, recommendations, exchanges of member and staff views and related functional advices, must, in the public interest, be held confidential, or subject to release in the discretion of the organization concerned. Otherwise, there would result a destructive dimunition of candor on the part of the participating officials and employees in speaking their minds freely and uninhibitedly.

(2) A need to preclude those sophisticated in market analysis and speculators from gaining unfair profits or obtaining unfair advantages by trading transactions in securities or foreign exchange, particularly subjects having long-term implications;

(3) Prevention to the extent possible, of any interference with the orderly execution of policies or objectives of other government agencies concerned with domestic or foreign economic of fiscal matters;

(4) A need to preclude, to the extent possible, interference with or impairment of ongoing or prospective financial transactions with foreign banks,

bankers or countries that could have both immediate and long-term critical impact or influence on the flow of gold and of dollar balances to or from foreign countries. Particularly relevant to the last mentioned consideration is the fact that memoranda of discussion of Committee meetings frequently contain sensitive references to or statements by or about foreign governments and foreign central banks. Equally supportive of the time lag applied to memoranda of discussion are the references therein to known or anticipated domestic fiscal policy actions, congressional programs, and related governmental action information, the premature publication of which could cause disruptions in financial markets.

In summary, it is the Committee's view that the content, volume, and timing of its publications exceed those of any other central bank. The Committee's position with respect to the exempt status of memoranda of discussion is believed to be wholly supported by the provisions of the Freedom of Information Act, its legislative history, and the Attorney General's manual accompanying that Act. As to the Committee's voluntary action in not wholly relying on the exemption status attributable to such memoranda, the Committee's experienced judgment as to an appropriate time lag for availability, has been determined critically necessary for the reasons above set forth. Any appeal of the foregoing decision that Mr. Merrill may find it necessary to pursue, may be initiated by following the procedures set forth in the enclosed copy of § 271.4(c)-(f) of the Federal Open Market Committee Rules Regarding Availability of Information which were recently amended and became effective on February 19, 1975.

Sincerely yours,

/s/ Arthur L. Broida
ARTHUR L. BROIDA
Secretary
Federal Open Market Committee

Enclosures

EXHIBIT C

INSTITUTE FOR PUBLIC INTEREST REPRESENTATION
GEORGETOWN UNIVERSITY LAW CENTER

March 27, 1975

FREEDOM OF INFORMATION ACT APPEAL

Mr. Arthur L. Broida, Secretary
Federal Open Market Committee
Federal Reserve Building
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Dear Mr. Broida:

This letter is an appeal pursuant to the Freedom of Information Act ("FOIA"), as amended, 5 U.S.C. § 552, and the relevant Federal Open Market Committee ("FOMC") regulations, 12 C.F.R. § 271.4, 40 Fed. Reg. 7897. By letter dated March 7, 1975, we requested, on behalf of David R. Merrill, prompt access to certain specified records of the FOMC. You denied our request in a letter dated March 21, 1975. Because we believe your decision to be in contravention of the FOIA, we ask that you reverse it.

As to the request for the records referred to in paragraph (1) of our March 7 letter, the FOIA requires that agency records requested by any person be made "promptly available." 5 U.S.C. § 552(a)(3). Only if the requested records fall within one of the exemptions set forth in the FOIA may the agency decline to disclose them. Because there were no exemptions claimed for these records in your letter of March 21, we believe that the decision not to make them promptly available was in violation of the FOIA. In addition, we note that the FOIA provides no authority for the FOMC's policy of delaying disclosure of nonexempt records.*

* The Board recently changed the period of delay from "approximately 90 days" to "approximately 45 days." *See* 40 Fed. Reg. 13204 (March 25, 1975).

Regarding the request for the records enumerated in paragraph (2) of our letter, you determined that these records were exempt from disclosure under exemption 5. 5 U.S.C. § 552(b)(5). In our judgment, the requested records do not fall within exemption 5. Even if you believe some of the requested material to be exempt, however, the nonexempt records and portions of records must be segregated and made promptly available to Mr. Merrill, and the withheld material must be described in detail. *See* 5 U.S.C. § 552(b); *Mink* v. *EPA*, 410 U.S. 73, 87-93 (1973).

We thank you for your prompt attention to this appeal.

Sincerely,

/s/ Victor H. Kramer
VICTOR H. KRAMER
Director

[Received March 27, 1975, 12:40 a.m., Arthur L. Broida]

EXHIBIT D

[SEAL]

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
Washington, D.C. 20551

April 23, 1975

Victor H. Kramer, Director
Institute for Public Interest Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Dear Mr. Kramer:

This refers to your letter dated March 27, 1975, on behalf of Mr. David R. Merrill, which appeals a denial of your request pursuant to the Freedom of Information Act (the "Act") (5 U.S.C. § 552) for the following documents:

(1) Records of policy actions taken by the Federal Open Market Committee at its meetings in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies.

(2) Memoranda of discussion at the above meetings.

In response to your request for information in category (1), please find enclosed copies of all those materials which you request. Please note that the deferment of availability of such materials is founded upon a legislative policy against premature disclosures which would impair the effectiveness of the operations of Government agencies.

With respect to the information requested in category (2), I have received the response earlier conveyed to you in Mr. Broida's letter of March 21, 1975, and have determined to affirm that decision. Those materials to which you are denied access consist wholly of memoranda of

Committee discussion that have been accorded confidential treatment under exemption (b)(5) of the Act. There are no factual materials in these memoranda which are subject to the requirements imposed by *E.P.A.* v. *Mink*, 410 U.S. 73, 87-93 (1973). Therefore your request for information in category (2) is hereby denied.

This determination is a final Committee action with respect to this matter. Pursuant to section (a)(4)(B) of the Act, you are entitled to file a complaint for judicial review of this determination with the appropriate Federal district court. The undersigned is the person primarily responsible for the partial denial of the present request within the meaning of section (a)(6)(C) of the Act.

Very truly yours,

/s/ Robert C. Holland
ROBERT C. HOLLAND

Enclosures

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0736

DAVID R. MERRILL, *et al.*, PLAINTIFFS,

v.

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, DEFENDANT.

ANSWER

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

Plaintiff Jenkins lacks standing to maintain this action.

THIRD DEFENSE

Plaintiff Merrill lacks standing to maintain the action specified in Plaintiffs' second claim for relief.

FOURTH DEFENSE

Plaintiffs Merrill and Jenkins have failed to state a claim upon which relief can be granted.

FIFTH DEFENSE

Answering specifically the numbered paragraphs of the complaint, the defendant pleads as follows:

1. This paragraph sets forth conclusions of law and not allegations of fact for which an answer is required, but, insofar as an answer may be deemed required, it is denied.

2. Denied, except to admit that the Federal Open Market Committee is found in the District of Columbia and that the documents here sought also are situated in the District of Columbia.

3, 4. Denied for the lack of knowledge or information sufficient to form a belief as to the truth of the allegations therein.

5. This paragraph sets forth conclusions of law and not allegations of fact for which an answer is required, but, insofar as an answer may be deemed required, it is denied, except to admit that the Federal Open Market Committee is located in the District of Columbia.

6. Denied, except to admit the authenticity of Exhibit A to the Complaint to which the Court is respectfully referred for the complete and accurate terms thereof.

7. Denied, except to admit the authenticity of Exhibit B to the Complaint to which the Court is respectfully referred for the complete and accurate terms thereof. The Court is also respectfully referred to the regulatory provisions cited for the complete and accurate terms of such provisions.

8. Denied, except to admit the authenticity of Exhibit C to the Complaint to which the Court is respectfully referred for the complete and accurate terms thereof.

9. Denied except to admit the authenticity of Exhibit D to the Complaint to which the Court is respectfully referred for the complete and accurate terms thereof.

10, 11, 12. These paragraphs set forth conclusions of law and not allegations of fact for which an answer is required, but, insofar as an answer may be deemed required, they are denied.

13. As this paragraph incorporates by reference Paragraphs 1 through 5 of the Complaint, the Court is respectfully referred to the Defendant's answers to Paragraphs 1 through 5 of the Complaint.

14, 15. Denied.

16, 17. These paragraphs set forth conclusions of law and not allegations of fact for which an answer is required, but, insofar as an answer may be deemed required, they are denied.

All allegations not hereinbefore admitted or denied, are denied.

Respectfully submitted,

REX E. LEE
Assistant Attorney General

EARL J. SILBERT
United States Attorney

ANN S. DE ROSS
Assistant United States Attorney

HARLAND F. LEATHERS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0736

DAVID R. MERRILL, ET AL., PLAINTIFFS

v.

FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, DEFENDANT

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Plaintiffs hereby set forth the following material facts as to which there is no genuine issue:

1. By letter dated and delivered on March 7, 1975, plaintiff Merrill requested defendant FOMC, pursuant to subsection (a)(3) of the FOIA, 5 U.S.C. § 552, to provide him with access to the following reasonably described records in its possession:

> (a) records of policy actions taken by the Federal Open Market Committee at its meetings in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies, and (b) memoranda of discussion at the above meetings.

Complaint, Exhibit A; Answer ¶ 6.

2. By letter dated March 21, 1975, and signed by Arthur L. Broida, Secretary to the FOMC, defendant FOMC denied plaintiff Merrill prompt access to the records described in paragraph 1. With regard to the records described in paragraph 1(a), the sole basis stated for the denial was defendant FOMC's "determination" that said records be made available to the public on a "time-delay basis." Defendant's regulation, 12 C.F.R. § 271.5, *as amended*, 40 Fed. Reg. 13204 (March 25, 1975), provides for a 45-day delay in the release of records of this type. With regard to the records described in paragraph

1(b), the stated basis for denial was exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Complaint, Exhibit B; Answer ¶ 7.

3. By letter dated and delivered March 27, 1975, plaintiff Merrill appealed this denial pursuant to 12 C.F.R. § 271.4. Complaint, Exhibit C; Answer ¶ 8.

4. By letter dated April 23, 1975, and signed by Robert C. Holland, a member of the Board of Governors of the Federal Reserve System and a member of defendant FOMC, defendant FOMC responded to plaintiff Merrill's appeal. Defendant FOMC provided plaintiff Merrill with copies of the records requested in paragraph 1(a), 45 days now having elapsed since the dates of the January and February 1975 FOMC meetings. Defendant stated that the delay in disclosure of these and similar records was "founded upon a legislative policy against premature disclosures which would impair the effectiveness of the operations of Government agencies." Defendant did not cite any exemption under subsection (b) of the FOIA, 5 U.S.C. § 552. With regard to the records requested in paragraph 1(b), defendant FOMC affirmed its initial denial of access pursuant to exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Complaint, Exhibit D; Answer ¶ 9.

5. Plaintiff John Jenkins is a resident of North Springfield, Virginia, and a Washington reporter covering financial and economic news, including the policies of the defendant FOMC and its forecasts of economic activity. As a professional journalist regularly reporting on current national economic trends, he has a strong interest in and a continuing and immediate need for information about the present activities of the FOMC as it affects national monetary policy. Affidavit of John A. Jenkins.

6. Plaintiff John Jenkins has not filed a request under the FOIA with the defendant FOMC for records of policy actions adopted by the defendant Committee at its meetings in January 1975 and February 1975 or any subsequent meetings. Jenkins is aware of the defendant's regulation which requires a 45-day delay in the release of these records. Affidavit of John A. Jenkins.

7. Plaintiff Jenkins is, and at all times herein rele-

vant was, a reporter with a journalistic need for the prompt release of the records of policy actions adopted by defendant. He is injured in fact by the defendant's regulation requiring a 45-day delay in the release of the records of policy actions. Affidavit of John A. Jenkins.

8. The most recent publicly available memoranda of discussion of the FOMC meetings occurred in 1969. These memoranda contain many statements of fact easily segregable from expressions of opinion. Affidavit of Brian W. Bulger.

9. The memoranda of discussion for the years from 1970 to date have not been published and are not yet otherwise available to the public. Affidavit of Brian W. Bulger.

Respectfully submitted,

/s/ Victor H. Kramer
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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil No. 75-0736

DAVID R. MERRILL, ET AL., PLAINTIFFS

v.

FEDERAL OPEN MARKET COMMITTEE
OF THE FEDERAL RESERVE SYSTEM

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO DISPUTE, PURSUANT TO LOCAL RULE 1-9(g)

1. By letter dated March 7, 1975 (Exhibit A of Plaintiff's Complaint), the Institute for Public Interest Representation at Georgetown University Law Center requested access to the following information on behalf of one David R. Merrill:

(a) Records of policy actions taken by the Federal Open Market Committee at its meetings in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies.

(b) Memoranda of Discussion at the above meetings.

2. With respect to the Records of Policy Actions requested in paragraph (a), the Plaintiff was informed in a letter from Mr. Arthur L. Broida, Secretary of the FOMC, dated March 21, 1975 (Exhibit B of Plaintiff's Complaint) that such Records would be available on a recently-shortened time delay basis of approximately 45 days: the release dates for the January and February 1975 meetings would be March 24 and April 7, respectively. Mr. Broida also supplied the location for obtaining copies. The plaintiff appealed the deferred release time table to the Board by letter dated March 27, 1975 (Exhibit C of Plaintiff's Complaint). Full release of the

materials requested in paragraph (a) was made by the Board in a response dated April 23, 1975 (Exhibit D of Plaintiff's Complaint), since the 45-day period following the meetings at issue had elapsed and the materials were public knowledge.

3. With respect to the Memoranda of Discussion requested in paragraph (b), no release of this material has been made to date. At present, release of Memoranda is made only after five years, a lapse of time deemed sufficient by the FOMC to preclude serious adverse consequences attending premature release. Mr. Broida's March 21 response to Plaintiff, *supra*, set forth the FOMC's position that such Memoranda are exempt from the disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." In addition, Mr. Broida provided Plaintiff with an outline of policy reasons for the five-year delay in release. Mr. Holland upheld Mr. Broida's decision in an attached letter to Plaintiff dated April 23, 1975, *supra*.

Background and Functions of the Federal Open Market Committee ("FOMC")

4. The FOMC, composed of the members of the Board of Governors of the Federal Reserve System and representatives of five of the Reserve Banks, is charged by the Federal Reserve Act, as amended by the Banking Act of 1935 with the coordination of open-market operations, the most important monetary policy instrument employed by the System to help achieve the nation's economic goals (Act of August 23, 1935 (49 Stat. 684)). The 1935 Act provided for centralized policy formulation and administration in order to strengthen open-market operations as a monetary policy tool. Under the Act Reserve Banks no longer were permitted to engage or decline to engage in open-market operations without FOMC approval. (Affidavit of Merritt Sherman ¶ 8 (hereinafter Sherman Aff. ¶ —.)

5. Under the Banking Act of 1935, the FOMC adopted regulations and selected the Federal Reserve Bank of New York as agent to conduct open market operations. In addition, the FOMC began the practice, still in effect, of appointing an officer of the New York Reserve Bank as manager of the System Open Market Account. Under an FOMC directive of 1936, the Reserve Banks transferred all government securities in their individual accounts to the System account. (Sherman Aff. ¶ 9.)

6. The FOMC employs open market operations to influence the availability and cost of bank reserves, bank credit, and money. When the Manager of the System Open Market Account purchases securities in the open market, the payment is ordinarily deposited in the sellers' bank and credited to that bank's reserve account in its regional Federal Reserve Bank. This process increases the total volume of bank reserves. As the FOMC increases bank reserves through open market purchases, banks can expand their total volume of loans and investments. This expansion in turn immediately expands the money supply since the demand deposits commercial banks create when they loan and invest money are an important component of the nation's total money supply. Interest rates, the price of credit, shift to reflect the increased availability of credit. Should the System sell securities rather than purchase, the money supply will tend to contract as reserves flow out of commercial banks into the Federal Reserve. (Affidavit of Robert C. Holland ¶¶ 4, 5, 12 (hereinafter Holland Aff. ¶ —.)

7. Other major economic tools employed by the Federal Reserve System include the setting of reserve requirements for banks that are members of the Federal Reserve System and the determination of the discount rate for borrowing by member banks. All these instruments are complementary; effective monetary policy requires careful coordination in their use. (Holland Aff. ¶ 3.)

8. In addition to operations in the *domestic* securities market, the FOMC authorizes and directs operations in foreign exchange markets for major convertible currencies. (Holland Aff. ¶ 3.)

9. The formulation of monetary policy by the FOMC is a continuous process. The FOMC typically meets once each month, although the Committee's rules, which parallel the statute, require only that the FOMC meet at least four times each year (12 CFR 272). The discussion at the Committee's monthly meetings includes comments by individual members of the Committee regarding the state of the economy, its prospects for the future, and recommendations by members regarding appropriate long-run and short-run open market policy. During the meetings, the System Account Manager's staff reports on open market operations and on developments in the economy and in domestic and foreign financial markets. On occasion, individual FOMC members or its staff report on meetings they have attended that have a bearing on the Committee's decision. Following a full give-and-take discussion of the FOMC members' often divergent views on policy, a consensus in the form of a Domestic Policy Directive is produced at each meeting to guide the System Account Manager at the Federal Reserve Bank of New York until the FOMC meets again.

In recent years, the FOMC has expressed its objectives in terms of rates of growth for bank reserves and various monetary aggregates, subject to a constraint relating to the permissible range of fluctuation in the weekly average Federal funds rate (the rate at which banks are willing to lend or borrow immediately available reserves on an overnight basis). (Holland Aff. ¶ 11 and 12; Affidavit of Arthur L. Broida Concerning the Contents of Memoranda of Discussion ¶ 5 (hereinafter Broida Aff. II ¶ —)).

10. Following the policy guidelines of the Domestic Policy Directive, the System Account Manager buys and sells securities in the open market for the System Account. Day-to-day operations are discussed at a daily conference call among the Manager, senior staff of the Committee, and at least one member of the Committee. Other members of the Committee are informed by wire each day of the action which the Account Manager expects to take in light of developing conditions on that day. In transacting business for the System Account, the Manager deals

with about two dozen dealers who actively make markets in U.S. government and Federal agency securities and who compete with one another for the available business. Roughly half of these dealers in government securities are departments of large commercial banks; the other market participants include large investment firms and smaller firms specializing in government securities. All of these market participants buy principally, if not exclusively, for their own accounts, as distinguished from accounts of customers for whom they may on occasion act as agents. (Holland Aff. ¶¶ 9-10)

The Nature of FOMC Records

11. Under § 10 of the Federal Reserve Act, the Board of Governors of the Federal Reserve System is required to keep a complete record of the action taken by the Board and by the Federal Open Market Committee upon all questions of policy relating to open market operations, recording therein the votes taken in connection with the determination of open market policies and the reasons underlying the action of the Board and the Committee in each instance. Section 10 also mandates that the Board make an annual report to Congress, including a full account of actions taken during the preceding year with respect to open market policies and operations. Affidavit of Arthur L. Broida Concerning Records of the FOMC ¶ 2 (hereinafter Broida Aff. I ¶ —)).

12. Each meeting of the FOMC results in three types of *reports*: *Memoranda of Discussion*, *Minutes of Actions*, and *Records of Policy Actions*. The FOMC's *Domestic Policy Directive* is reproduced in all three of these reports. Other identifiable records relevant in this suit are the selected List of Actions, an abridgement of the Minutes of Actions, and various statistical releases of the Federal Reserve System. (Broida Aff. I ¶ 3)

13. The *Domestic Policy Directive* is a statement of general monetary policy generated at each FOMC meeting, in the form of guidelines for the System Account Manager to follow until the next meeting. Public availability of the Domestic Policy Directive is routinely deferred

for a period of approximately 45 days after each Committee meeting in accordance with the Committee's Rules, 12 CFR § 271.5. After approximately 45 days, each Directive is published in the *Federal Register*. (Broida AFF I ¶ 9).

14. The *Record of Policy Actions* records the FOMC's Domestic Policy Directive and discloses the Committee's objectives with respect to open market policy. It records all votes case [sic] by members of the Committee in connection with the determination of open market policy, the reasons underlying the Committee's policy actions, including descriptions of then-current and prospective economic developments and domestic and international financial market conditions, and statements of the reasons for any dissenting votes. Other policy actions in addition to the Directive which may be recorded in these Records include amendments to the foreign currency directive and amendments to the domestic or foreign currency authorization but generally do not include actions relating to operational procedures. The Records contain statistical information upon which the Committee's decisions are based and which may be referred to during the Committee's deliberation. They also include the Committee's objectives for the monetary and credit aggregates, expressed as to a tolerance range for growth rates over specified periods of time and similar tolerance ranges for bank reserves and for the Federal funds rate, (Broida AFF I ¶ 10).

15. The Record of Policy Actions is drafted only *after* the relevant meeting of the FOMC has been concluded. The FOMC's Secretariat prepares the report and distributes it for comments to all participants at the meeting. Thereafter, the report is submitted in revised form to the Board of Governors for approval and inclusion in the Board's Annual Report to Congress. The existence and public availability of Records of Policy Actions are noted in the *Federal Register* notices announcing and recording the provisions of each Domestic Policy Directive. Like the Domestic Policy Directives which they contain, Records of Policy Actions are not made available for public inspection until approximately 45

days after the meeting for which they are prepared. At that time, the Record of Policy Actions and the Domestic Policy Directive are publicly released in the form of a press release and published in the Federal Reserve *Bulletin*. The Board's Annual Report to Congress is based upon these Records of Policy Actions. (Broida AFF I ¶ 13).

16. The *Memoranda of Discussion* sought by plaintiff are the minutes of the meetings of the FOMC. Like the Records of Policy Actions, Memoranda are prepared only after FOMC meetings. Drafts are circulated for comment among persons who attended, and a final, revised version is approved by the FOMC at a subsequent meeting. Typically a memorandum is a chronological accounting which records (1) usually verbatim, the reports of the Manager and/or Deputy Managers on open market operations in domestic securities and foreign currencies since the previous meeting and the reports of staff economists on the business and financial situation and outlook; (2) usually in somewhat abbreviated and paraphrased form, the statements of participants made in the course of the Committee's discussions of the economic situation, its deliberations on policy with respect to domestic and foreign currency operations, and the offering of opinions and recommendations on these and related matters; and (3) the actions of the Committee with respect to policy and procedural matters. The discussion portions of the Memoranda, which make up the great bulk of the material, are typewritten and double-spaced. All *actions*, including policy actions, are recorded, set off, and single-spaced in the text of the Memoranda. These actions are also recorded in the *Minutes of Action*, a separate document prepared after each meeting. Finally, from time to time, staff memoranda or other documents may be attached to the Memoranda for the convenience of the Committee; these documents may include sensitive memoranda regarding confidential discussions with foreign governments and foreign central banks. (Broida AFF I ¶¶ 4 and 6; Broida AFF II ¶ 3).

17. While the FOMC is not required by law to prepare and maintain its Memoranda of Discussion, it has

followed the policy since 1972 of making Memoranda available to the public five years after the close of the year in which such Memoranda are prepared. One signed original copy is filed in the National Archives and copies are made available at offices of the Board of Governors and the Federal Reserve Banks. The Minutes of Actions are made available for inspection and copying in the Board's Office of Public Information approximately 45 days after the conclusion of a meeting. (Broida AFF I ¶¶ 7-8).

18. A *Selected List of Actions* is made available for public inspection and copying *immediately* after each relevant meeting. The Selected List is an abridged version of the Minutes of Actions, omitting policy actions of the FOMC, publication of which must be deferred for approximately 45 days in the public interest pursuant to 12 CFR § 271.5. The Selected List also omits actions occasionally where, for example, disclosure might disrupt satisfactory conclusion of negotiations with a foreign central bank. (Broida AFF I ¶ 15).

19. *Statistical Releases* are made each week or at other periodic intervals by the Board of Governors. These releases promptly and fully disclose the *results* of the FOMC's Open Market Operations and much of the data on which FOMC policy decisions are based. The most important of these releases include: "Factors Affecting Bank Reserves and Condition Statement of F.R. Banks," "Money Stock Measures," the weekly Summary, "Deposits, Reserves and Borrowing of Member Banks," and the "Weekly Summary of Banking and Credit Measures." Besides publication in the monthly Federal Reserve *Bulletin*, the documents are released to and routinely published in the financial sections of local newspapers throughout the country. (Broida AFF I ¶ 16).

20. Finally, many particular actions of the Committee are announced immediately—through press releases and the *Federal Register*—without the deferral of availability deemed necessary for such actions as the Domestic Policy Directive. An example of a recent action which was made immediately available is a decision to extend repurchase agreements to bank dealers in Government securities, as

well as to the nonbank dealers previously authorized. (Broida AFF I ¶ 17).

Factors Supporting Deferred Availability of the Record of Policy Actions and the Memoranda of Discussion

21. The major reason supporting the requirement of a delay in publication of the Federal Open Market Committee's domestic policy Directive and Records of Policy Actions is that immediate or very early disclosure of Federal Open Market Committee's domestic policy Directive and Records of Policy Actions might well lead to exaggerated market reactions that could interfere with the orderly execution of policy, and hence interfere with the accomplishment of desired monetary policy objectives. (Affidavit of Peter D. Sternlight ¶ 2 (hereinafter Sternlight AFF ¶ —)).

Open Market operations, as contrasted with changes in reserve requirements by the Board of Governors, or changes in Reserve Bank discount rates, are often intended to have a gradual or limited effect upon conditions in the market and the level of bank reserves. (Sternlight AFF ¶ 3).

When it appears necessary for the Committee's open market operations, and their policy implications, to be relatively visible and decisive, rather than gradual, the Committee can tailor its market actions to achieve the desired level of visibility and decisiveness by varying the type and scale of its transactions. Such variances would still leave some uncertainty among market observers as to whether or nor, or to what extent, the Committee had changed its policy at the meeting which intervened between the effective date of the most recently published Directive and the date of its publication. This degree of uncertainty among market participants is desirable in that it permits the Federal Reserve to modify its open market objectives flexibly, in response to new information and analyses, without generating excessive market reactions to each modification. In contrast, the certain knowledge of Committee decisions that

would follow immediate disclosure is likely to produce exaggerated market reactions deleterious to the functioning of the financial system. (Sternlight AFF ¶ 4).

A delay in disclosure of Federal Open Market Committee decisions is an essential element to the effectiveness of open market operations; and immediate disclosure of the Committee's Domestic Policy Directive and Record of Policy Actions might well impair the effectiveness of those operations as an instrument of monetary policy. (Sternlight AFF ¶ 5).

22. Immediate disclosure of the FOMC's Record of Policy Actions would aid speculators without significantly assisting small investors. (Affidavit of Stephen H. Axilrod ¶ 3 (hereinafter Axilrod AFF ¶ —)). About 25 dealers in Government securities routinely conduct transactions with the FOMC's tranding [sic] desk, including various stock market firms and several large commercial banks. These dealers buy and sell securities *for their own account*. (Axilrod AFF ¶ 4). Premature disclosure of the FOMC's tolerance ranges for the money supply, bank reserves, and Federal funds rate—items normally disclosed in the Record of Policy Actions—would cause interest rates to react rather promptly in a manner which brings about the result which the market believed would ensue from contemplated Committee actions to enforce those tolerance ranges. (Axilrod AFF ¶ 6). Knowledgeable speculators and active market participants would thus be the primary, if not exclusive, beneficiaries of immediate disclosure since small investors would not have the expertise to intrepret the necessarily technical aspects of these decisions. (Axilrod AFF ¶ 3).

23. There is danger from the immediate publication of the Record of Policy Actions that the market will overreact and that such overreaction will be beyond the power of the Committee or of the System to control: in short, the objectives of monetary policy will be frustrated. It is entirely possible that the market reaction to publication of the Policy Record will be one that the FOMC did not intend to create and one that, in fact, will impede the monetary policy being pursued at the time. (Axilrod AFF ¶ 6). The FOMC does not definitively decide on a

particular interest rate level for an entire period between meetings; rather, the interest rate levels that will evolve after a meeting depend, in part, on the strength and pattern of credit demands and the extent to which the System finds it necessary to adjust the provision of bank reserves through open market operations in an effort to keep monetary and credit aggregates on track. (Holland AFF ¶ 12). Should the FOMC find it necessary to counteract excessive or adverse market reactions to premature disclosure of its objectives, remedial action taken by the Committee might well create additional problems by damaging the financial industry. For example, such actions could lead to large capital losses if market interest rates have been pushed down beyond what is justified by available information and could inhibit financing operations of the U.S. Treasury and of other public and private borrowers. (Axilrod AFF ¶ 7).

24. The Memoranda of Discussion are, in substance, minutes of the FOMC. Although actions of the FOMC are referenced in the Memoranda of Discussion, such actions are disclosed to the public in the FOMC's Records of Policy Actions and the Minutes of Actions. The essential facts and considerations underlying FOMC decisions are disclosed to the public through the Board's weekly statistical releases and the Committee's Record of Policy Actions. What remains undisclosed in the Memoranda are reports of the deliberations of the FOMC through which the Committee reaches its decisions on questions of policy. These memoranda reflect the unfettered, spontaneous expressions of the views and opinions of FOMC members and staff. Some of these expressions may be put forth primarily to elicit discussion and clarification of issues rather than as statements of firmly held views. Some may turn out to be inconclusive with respect to the FOMC's ultimate decisions, and others may be at odds with those decisions. All such expressions do, however, contribute to the decisional process. If the FOMC's Memoranda of Discussion were to be released prematurely, the FOMC would be faced with the choice of permitting a destructive loss of candor in its deliberations or of preserving the members' ability to

speak their minds freely and fully by terminating the preparation of such Memoranda. (Broida Aff. I ¶ 8; Broida Aff. II ¶ 5)

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0736

DAVID R. MERRILL, ET AL., PLAINTIFFS

v.

FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, DEFENDANT

AFFIDAVIT CONCERNING RECORDS OF THE FOMC

I, Arthur L. Broida, being first duly sworn, depose and say as follows:

1. I was originally employed in the Federal Reserve System in 1947 as an Economist in the Division of Research and Statistics. In 1963 I was made Assistant Secretary to the Board of Governors. In March of 1964 I was named Assistant Secretary to the Federal Open Market Committee ("Committee"); and in 1969 I became Deputy Secretary of the Committee. I am presently Assistant to the Board of Governors and Secretary of the Federal Open Market Committee, positions I have held since 1973. As Secretary of the Committee, I have ultimate supervisory responsibility for, and control over, the records of the Federal Open Market Committee. I am the official chiefly responsible for preparation of the Committee's Memoranda of Discussion and Records of Policy Actions.

The Nature of FOMC Records

2. Under § 10 of the Federal Reserve Act, the Board of Governors of the Federal Reserve System is required to keep a complete record of the action taken by the Board and by the Federal Open Market Committee upon all questions of policy relating to open market operations, recording therein the votes taken in connection with the determination of open maket policies and the reasons underlying the action of the Board and the Committee in each instance. Section 10 also mandates that the Board

include in its annual report to the Congress a full account of actions taken during the preceding year with respect to open market policies and operations and a copy of the records mentioned above as required by § 10.

3. Each meeting of the Federal Open Market Committee results in three types of *reports*: Memoranda of Discussion, Records of Policy Actions, and Minutes of Actions. The Committee's *Domestic Policy Directive* is reproduced in all three of these reports. Other identifiable records relevant in this suit are the Selected List of Actions (an abridgement of the Minutes of Actions), and various statistical releases of the Federal Reserve System.

* * * *

Domestic Policy Directive

9. The Committee's Domestic Policy Directive is a statement of a general monetary policy, in the form of a directive to the Federal Reserve Bank of New York, for use by the Manager of the System Open Market Account in conducting open market operations after each meeting of the Committee. This Directive is, of course, recorded in the Memoranda of Discussion. It is also recorded in the Committee's Record of Policy Actions and in the Committee's Minutes of Actions. Public availability of the Domestic Policy Directive is routinely deferred for a period of approximately 45 days after each Committee meeting in accordance with the Committee's Rules, 12 C.F.R. § 271.5. At the end of this period, the Direct is published in the *Federal Register*, released to the press as part of the Record of Policy Actions, and made available for public inspection at the Board's Public Information Office as part of the Committee's Minutes of Actions. The Committee commenced publishing the Directive in the *Federal Register* in 1967.

Record of Policy Actions

10. The Records of Policy Actions report all votes cast by member of the Committee in connection with the determination of open market policy, the reasons underlying the Committee's policy actions, and the reasons for any dissenting votes. The policy actions so reported consist of the text of the Domestic Policy Directive, which is customarily modified from meeting to meeting, and amendments—usually less frequent—to the three other policy instruments issued by the Committee: the Authorization for Domestic Open Market Operations, the Foreign Currency Directive, and the Authorization for Foreign Currency Operations. The Policy Records generally do not report actions relating to procedural matters, although some may be included if deemed of sufficient general interest.

In connection with the explanation of the Committee's action on the Domestic Policy Directive, the Policy Records contain descriptions of current and prospective economic developments and domestic and international financial market conditions, which are summaries of the economic and financial information upon which the Committee's decision was based. The Records also report the Committee's objectives for monetary and credit aggregates, expressed as tolerance ranges for growth rates over specified periods of time, and similar tolerance ranges for bank reserves and a key interest rate, the Federal funds rate.

11. From time to time, circumstances require that the Committee members vote on proposed amendments to a policy instrument during the period between FOMC meetings. Such votes are taken and the resulting actions and the reasons therefore are published in the Record of Policy Actions of the Committee's most recent meeting. The Records of Policy Actions of the Committee's January 1975 and February 1975 meetings record some such actions of the Committee taken after those respective meetings.

12. These Records of Policy Actions are incorporated by reference in the *Federal Register* notices announcing and recording the provisions of each Domestic Policy Directive. Like the Domestic Policy Directives which they contain, the Records of Policy Actions are not made available for public inspection until approximately 45 days after the meeting which they record. At that time,

the Record of Policy Actions, including the Domestic Policy Directive, is made public in the form of a press release, and subsequently it is published in the monthly *Federal Reserve Bulletin*. The Records for each calendar year are included in the Board's Annual Report to Congress for that year, as required by section 10 of the Federal Reserve Act.

13. The Record of Policy Actions can be prepared only *after* the relevant meeting of the Committee has been concluded. The FOMC's Secretariat prepares a preliminary draft and distributes it for comments to participants at the meeting, including the 12 presidents of Federal Reserve Banks (who do not reside in Washington, D.C.), five of whom are Committee members. The Secretariat prepares a revised draft in light of comments received and submits it for review to the Board of Governors, which by law is responsible for these records. Some time is required for preparation and successive reviews of this material. Thus, while the Domestic Policy Directive exists in final form at the end of the meeting at which it is adopted, the Record of Policy Actions does not exist as a record or in any other form at the start of the 45-day deferred availability period. In fact, these Records are usually not submitted to the Board of Governors for final approval until after the FOMC's next succeeding meeting. Prior to 1967, the FOMC's Records of Policy Actions for a full calendar year were published only after the close of the year, in the Board's Annual Report to Congress. Since 1967, however, the Record for each meeting has been published separately, at the end of the deferred availability period.

* * * *

/s/ Arthur L. Broida
ARTHUR L. BROIDA

Subscribed and Sworn to before me this 24th day of October, 1975.

/s/ Gene G. Stephens
Notary Public

My Commission Expires August 31, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0736

DAVID R. MERRILL, ET AL., PLAINTIFFS

v.

FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, DEFENDANT

AFFIDAVIT

I, Robert C. Holland, being first duly sworn, depose and say as follows:

1. I am a member of the Board of Governors of the Federal Reserve System. I was appointed to the Board by President Nixon effective June 11, 1973. I am also by statute a member of the Federal Open Market Committee. I originally joined the Federal Reserve System in 1949 as a Financial Economist for the Federal Reserve Bank of Chicago where I was later appointed Assistant Vice President (Research) in 1957 and Vice President (Loans) in 1959. I joined the Board's staff in 1961 and held various official positions in the Division of Research and Statistics from 1961 until 1965. The Division of Research and Statistics provides the Board and the Federal Open Market Committee with the economic analysis and information needed for the formulation of monetary and credit policies and conducts research relating to the effects of monetary policy. I also served as Associate Economist, Federal Open Market Committee, from 1962 until 1966 and as Secretary of the Federal Open Market Committee from 1966 until 1973. From 1965 until 1967, I served as Adviser to the Board of Governors. I was Secretary of the Board from 1968 until 1971 and I became Executive Director of the Board in 1971, a position I held until my appointment as a Member of the Board. I hold the degree of Bachelor of Science in Finance from the Wharton School of Finance and Commerce, University of Pennsylvania, and a Master of Arts and Doctor of

Philosophy in Economics from the University of Pennsylvania.

FUNCTIONS OF THE FEDERAL OPEN MARKET COMMITTEE

2. The Federal Open Market Committee (FOMC) is composed of the seven members of the Board of Governors and five Reserve Bank presidents, one of whom is always the president of the Federal Reserve Bank of New York, and four of whom serve in rotation. The FOMC is by law given the responsibility of using, in the public interest, the most important monetary policy instrument employed by the Federal Reserve System to influence the availability and cost of bank reserves, bank credit, and money, in order to help achieve the nation's economic goals.

3. The FOMC authorizes and directs Federal Reserve Bank purchases and sales of U.S. Government and certain other securities in the domestic securities market. These Reserve Bank operations are conducted through a combined investment pool termed the System Open Market Account, under the direct supervision of a Manager instructed by the FOMC. In addition, the FOMC authorizes and directs Reserve Bank operations in foreign exchange markets for major convertible currencies. The other major instruments of monetary policy include the setting of the discount rate and of reserve requirements for commercial banks that are members of the Federal Reserve System. It is important to note that the various instruments of monetary policy are complementary, and the Federal Reserve System thus effects its monetary policy through the coordinated use of these instruments.

4. Open market operations are important because of their prompt and direct influence upon the level of member bank reserves. When the System Open Market Account (SOMA) purchases securities in the open market, the payment is ordinarily deposited in the seller's bank and credited to that bank's reserve account in its regional Federal Reserve Bank. This process increases the total volume of bank reserves. Conversely, when the SOMA

sells securities, the sales price typically is deducted from the buyer's bank's reserve account, thereby decreasing the volume of reserves held by member banks.

5. Changes in the volume of member bank reserves necessarily influence the ability of member banks to expand loans and investments. Member banks are required to hold a certain amount of reserves behind their deposits in accord with Board's Regulation D, 12 C.F.R. § 204. These banks typically respond to a lowering of reserve requirements or to a supplying of reserves through Open Market purchases by expanding loans and investments and/or by selling their newly excess reserves to other member banks which are short of reserves or which need additional reserves in order to take advantage of particular lending and investment opportunities. As a result, deposits, loans and investments for the banking system expand to about the limit permitted by the required reserve ratio.

6. Changes in the availability of member bank reserves influence interest rates on money market instruments, including the Federal funds rate (the rate at which banks are willing to lend or borrow immediately available reserves on an overnight basis), and interest rates in the economy as a whole. Spending and investment by all sectors of the economy and all levels of industry tend to be influenced by the terms and conditions for obtaining credit.

7. By far the largest portion of the FOMC's open market operations involves the purchase and sale of U.S. Government securities—although the FOMC also directs purchases and sales of some Federal agency securities and bankers acceptances. One reason for this is that open market operations can work effectively as a tool of monetary policy only if the FOMC is able to buy or sell securities promptly, at its own initiative, and in whatever volume may be needed to keep the supply of bank reserves in line with prevailing policy objectives. The enormous secondary market in U.S. Government securities is large enough for the effective conduct of monetary policy.

8. The FOMC meets approximately once each month to deliberate on policy objectives and to give policy guid-

ance, for the period until the Committee's next meeting, to the System Open Market Account (SOMA) Manager, who is a senior officer of the Federal Reserve Bank of New York. The FOMC expresses the policy guidance in the form of a Domestic Policy Directive issued to the Federal Reserve Bank of New York.

9. Day-to-day operations in SOMA are discussed at a daily conference call among the Manager, senior staff of the Committee, and at least one member of the Committee. Other members of the Committee are informed by wire each day of the action which the Account Manager expects to take in light of developing conditions on that day.

10. In transacting business for the SOMA, the Manager deals with about 25 dealers who actively make markets in U.S. Government and Federal agency securities and compete with one another for the available business. Roughly half of these dealers are departments of large investment firms and smaller firms that specialize in government and closely related securities. All of these market participants buy principally, if not exclusively, for their own accounts.

11. The formulation of monetary policy by the FOMC is a continuing process. The discussion at the monthly meetings includes comments by individual members of the Committee regarding the state of the economy and its prospects for the future, recommendations by members regarding the appropriate long-run open market policy, and a full give-and-take discussion of these often divergent views in order to reach a consensus and thus provide guidance to the SOMA Manager. During the meetings, the Manager, or his deputies, and staff economists, report on open market operations, and on developments in the economy and in domestic and foreign financial markets. On occasion, individual members of the Committee or the staff report on meetings they have attended that have a bearing on the Committee's decisions.

12. In recent years, the Committee has expressed its objectives in terms of rates of growth for bank reserves and various monetary aggregates, subject to a constraint relating to the permissible range of fluctuation in the weekly average Federal funds rate. The FOMC does not

definitively decide on a particular interest rate level for an entire period between meetings; rather, the interest rate levels that will evolve after a meeting depend, in part, on the strength and pattern of credit demands, the behavior of the monetary aggregates, and the extent to which the System finds it necessary to adjust the provision of bank reserves through open market operations in an effort to keep monetary and credit aggregates on track.

FACTORS SUPPORTING DEFERRED AVAILABILITY

13. The two major reasons for the Committee's policy of deferred availability include: preventing interference with the orderly execution of policy; and preventing speculators and others from gaining unfair advantages. The reasons supporting deferred availability are more fully set forth in the FOMC's Rules Regarding Availability of Information, particularly 12 C.F.R. § 271.5(b).

14. SOMA open market operations usually are intended to have a gradual effect upon market conditions and the level of bank reserves in member banks, as opposed to the other tools of monetary policy, such as changes in reserve requirements and in the discount rates, which are often used when a more immediate response is desired. Should the Domestic Policy Directive be prematurely disclosed during the period prior to the FOMC's next meetings, the published directive would be relevant to current and forthcoming SOMA operations. Such premature release of the Directive would likely have a great impact upon market expectations, and run the undue risk of interfering with the orderly functioning of these markets. One of the most useful aspects of open market operations as a tool of monetary policy is its usefulness in implementing changes gradually or in enabling the FOMC to probe in a given direction while maintaining the ability to withdraw from that course if necessary. Even a moderate reaction in the market due to changed expectations caused by a prematurely disclosed Directive could impair the use of this monetary policy tool in this manner.

15. If the Directive were released immediately after an intervening meeting, there could still be a deleterious effect upon open market operations by causing fluctuating market rates if the disclosed Directive were first perceived as relevant to current operations by observers who acted accordingly and then had to reverse their action upon realizing that they had misconstrued the Committee's policy. In the FOMC's judgment, the possibility that this adverse effect will occur is no longer substantial 45 days after the relevant FOMC meeting.

16. The FOMC has carefully considered its policy of deferred availability in light of the critical importance of open market operations as a monetary policy tool and the Freedom of Information Act's policy of public disclosure. In the FOMC's present judgment, a policy of deferring availability of the Policy Directive, and publication of the Directive and of the Records of Policy Actions, for 45 days after each FOMC meeting provides the minimum deferment of availability that is consistent with the public interest in achieving an effective monetary policy and a sound national economy.

17. There are approximately twenty-five dealers in Government securities who routinely deal with the Committee's trading desk at the Federal Reserve Bank of New York. As previously stated, these dealers include several large commercial banks and various stock brokerage firms, all of whom buy and sell Government securities for their own account. If the tolerance ranges for the Federal funds rate, bank reserves and the monetary aggregates that the Committee has planned, as set out in the Record of Policy Actions, were disclosed, these dealers and other active institutions in the market would be in a position to act immediately; they would therefore, potentially have an unfair advantage over the individual investor who does not deal regularly in the Government securities market. These dealers would also be in a position to frustrate or interfere with attainment of the Committee's monetary policy objectives by acting immediately and substantially in a manner inconsistent with those objectives. Disclosure of the various tolerance ranges presently being utilized by the FOMC raises the

danger that the reaction of the market might not be one the Committee intended and might be beyond the power of the System to control effectively.

/s/ Robert C. Holland
ROBERT C. HOLLAND

Subscribed and sworn to before
me this 24th day of Oct., 1975.

/s/ [Illegible]
Notary Public
My Commission Expires Nov. 30, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0736

DAVID R. MERRILL, ET AL., PLAINTIFFS

v.

FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, DEFENDANT

AFFIDAVIT

I, Peter D. Sternlight, being duly sworn, depose and say as follows:

1. I am currently employed as a vice president of the Federal Reserve Bank of New York and deputy manager for domestic operations of the Federal Reserve System's open market account. As such I am responsible for directing the daily operations of the securities trading desk—the control center of the System's open market functions—under the guidance of Mr. Alan R. Holmes, the Manager of the open market account. I joined the staff of the Federal Reserve Bank of New York in 1950 as an economist in the foreign research division. After two years in the Army serving as an economist with the Defense Department, I was reassigned to the foreign and then the domestic research division of the New York Reserve Bank, first as an economist and later as a special assistant. In 1960, I was named chief of the domestic research division; and in 1961, I was made a special assistant in the securities department, following a leave for several months to serve as an assistant to the Under Secretary of the Treasury for Monetary Affairs. The following year I was appointed manager of the securities department at the Federal Reserve Bank; and in 1964, I was named an assistant vice president assigned to open market operations and Treasury issues. I departed the staff of the Federal Reserve Bank of New York in 1965.

From 1965 to 1967 I served as Deputy Under Secretary of the Treasury for Monetary Affairs. I returned to the New York Reserve Bank in 1967 as an assistant vice president. In 1968 I was named vice president and in 1973 I became deputy manager of the system account. I received a B.A. in economics from Swarthmore College and a Masters and Ph.D. in economics from Harvard University.

2. The major reason supporting the requirement of a delay in publication of the Federal Open Market Committee's domestic policy Directive and Records of Policy Actions is that immediate or very early disclosure of these materials might well lead to exaggerated market reactions that could interfere with the orderly execution of policy, and hence interfere with the accomplishment of desired monetary policy objectives.

3. Open Market operations, as contrasted with changes in reserve requirements by the Board of Governers, or changes in Reserve Bank discount rates, are often intended to have a gradual or limited effect upon conditions in the market and the level of bank reserves. Indeed, a major advantage of open market operations as a tool of monetary policy is that such operations can have a gradual though pervasive and significant effect on financial markets without the abrupt impact that would often be likely to follow immediate disclosure of Committee decisions.

4. When it appears necessary for the Committee's open market operations, and their policy implications, to be relatively visible and decisive, rather than gradual, the Committee can tailor its market actions to achieve the desired level of visibility and decisiveness by varying the type and scale of its transactions. Such variances would still leave some uncertainty among market observers as to whether or not, or to what extent, the Committee had changed its policy at the meeting which intervened between the effective date of the most recently published Directive and the date of its publication. This degree of uncertainty among market participants is desirable in that it permits the Federal Reserve to modify its open market objectives flexibly, in response to new information

and analyses, without generating excessive market reactions to each modification. In contrast, the certain knowledge of Committee decisions that would follow immediate disclosure is likely to produce exaggerated market reactions deleterious to the functioning of the financial system.

5. I conclude that a delay in disclosure of Federal Open Market Committee decisions is an essential element to the effectiveness of open market operations; and immediate disclosure of the Committee's Domestic Policy Directive and Record of Policy Actions might well impair the effectiveness of those operations as an instrument of monetary policy.

/s/ Peter D. Sternlight
PETER D. STERNLIGHT

Subscribed and sworn to before me
this 21st day of October, 1975.

/s/ Gena G. Stephens
Notary Public

My Commission Expires August 31, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0736

DAVID R. MERRILL, ET AL., PLAINTIFFS

v.

FEDERAL OPEN MARKET COMMITTEE OF THE
FEDERAL RESERVE SYSTEM, DEFENDANT

AFFIDAVIT

I, Stephen H. Axilrod, being first duly sworn, depose and say as follows:

1. I have been employed by the Board of Governers of the Federal Reserve System for 23 years, and by the Federal Open Market Committee for 7½ years. I currently hold the following positions: Adviser to the Board of Governors in the Office of the Managing Director for Economic Research and Policy and Economist (Domestic Finance) Federal Open Market Committee. I received an A.B. from Harvard College, magna cum laude in economics and Phi Beta Kappa. I also received my graduate degree in Planning at the University of Chicago and did additional graduate work in Economics.

2. The Federal Open Market Committee oversees the most important monetary policy instrument employed by the Federal Reserve System to influence the availability and cost of bank reserves, bank credit, and money, in order to help achieve the nation's economic goals. In addition to operations in the domestic securities market, the FOMC authorizes and directs operations in foreign exchange markets for major convertible currencies. Open market operations are important because of their prompt and direct influence upon the level of member bank reserves. Necessarily changes in the availability of member bank reserves influence the money supply and interest rates on money market instruments, including the Federal funds rate, and interest rates in the economy as a

whole. The other major instruments of monetary policy include the setting of reserve requirements for banks that are members of the Federal Reserve System and of the discount rate. It is important to note that the various instruments of Monetary Policy are complementary, and the Federal Reserve thus effects its Monetary Policy through the coordinated use of these various instruments.

3. Disclosure immediately after each meeting of the Federal Open Market Committee's Record of Policy Actions—which records the Committee's Domestic Policy Directive and discloses the Committee's objectives with respect to open market policy as reflected in the Directive as well as other policy actions, the reasons underlying these policy actions, and descriptions of then-current and prospective economic developments—would aid speculators and other active market participants unduly, if it were any aid at all, and would not significantly assist small investors who would not have the expertise to interpret the necessarily technical aspects of these decisions.

4. There are approximately 25 dealers in Government securities who routinely conduct transactions with the Committee's trading desk at the Federal Reserve Bank of New York, including various stock market firms and several large commercial banks, all of whom buy and sell securities *for their own account*. These large firms, together with other active market participants, rather than individual members of the public dealing in small amounts of securities would be the primary, if not exclusive, beneficiaries of immediate disclosure of the Committee's actions.

5. While there is a potential benefit to knowledgeable speculators and active market participants from immediate publications of the policy record, there is also danger that the market will overreact, and that such overreaction would be beyond the power of the Committee or of the Federal Reserve System to control, in short, that the objectives of monetary policy would be frustrated. It is entirely possible that the market reactions to premature publication of the policy record would be one that the Committee did not intend to create and one that, in fact,

would impede the monetary policy being pursued at the time by the Committee.

6. For example, premature disclosure of the Committee's tolerance range for the money supply, bank reserves and the Federal funds rate, items normally disclosed in the Record of Policy Actions may cause interest rates to react rather promptly in a manner that would bring about the result which the market believed would ensue from contemplated Committee actions to enforce those tolerance ranges. (The Federal funds rate is the rate at which banks are willing to buy or sell excess reserves—chiefly in transaction with other banks—on an overnight basis. The Committee's policy directives are intended to achieve certain objectives with respect to the size of the money supply, the Federal funds rate, and other key factors.) For example, if market participants believed, after viewing the Committee's ranges, that the odds favor a rise in the Federal funds rate, the market would react immediately in a manner which would tend to push up interest rates by selling securities. Alternatively, if market participants concluded that interest rates would go down as a result of the Committee's policy, the market would react in a manner consistent with that judgment and would, as a result, cause interest rates to go down and prices to go up. Such movements may be contrary to the Committee's intentions and would unduly complicate the ability of the FOMC to carry out policy.

7. Should the Committee find it necessary to counteract excessive or adverse market reactions to premature disclosure of its objectives, remedial action taken by the Committee might well create additional problems by damaging the financial industry, for example, by leading to large capital losses if market interest rates have been pushed down beyond what is justified by available information, and by inhibiting the financing operations of

the U. S. Treasury and of other public and private borrowers.

/s/ Stephen H. Axilrod
STEPHEN H. AXILROD

Subscribed and sworn to before me
this 24th day of October, 1975.

/s/ Gena G. Stephens
Notary Public

My Commission Expires August 31, 1980

[SEAL]

FEDERAL OPEN MARKET COMMITTEE

For immediate release March 24, 1975

The Federal Open Market Committee announced today that it has voted to speed up publication of the records of policy actions taken at each of its monthly meetings.

At its meeting of March 18, the Committee revised its Rules Regarding the Availability of Information to reduce the delay between a meeting and the publication of the information regarding the domestic policy directive from approximately 90 days to approximately 45 days.

In view of this action, the FOMC and the Board of Governors today released the attached record of policy actions taken at the FOMC meeting of January 20-21, 1975. Under previous rules, this record would not have been made available until April 21. The record for the meeting held on February 19 will be released on or about April 7, 1975.

A delay of approximately 90 days had been in effect since mid-1967 when the rules were changed to comply with the Freedom of Information Act. Prior to 1967, the records of policy actions were published only in the Board's Annual Report to Congress.

In the light of experience, the Committee decided that a delay as long as 90 days was no longer necessary to avoid an unacceptable degree of risk that speculators would be able to take unfair advantage of the information or that market reactions would impair the effectiveness of the Committee's functions.

The records of policy actions also are published in the Federal Reserve Bulletin and the Board's Annual Report. The summary descriptions of economic and financial conditions they contain are based on the information that was available to the Committee at the time of the meeting, rather than on data as they may have been revised since then.

Attachment

Attachment A

to Defendant's Statement of Points and Authorities
in Support of Defendant's Motion for Summary Judgment

RECORD OF POLICY ACTIONS OF THE FEDERAL OPEN MARKET COMMITTEE

Meeting held on January 20-21, 1975 [1]

1. *Domestic policy directive*

Preliminary estimates of the Commerce Department indicated that real output of goods and services (real gross national product) had fallen at an annual rate of about 9 per cent in the fourth quarter of 1974, after having declined at an average rate of about 3.5 per cent over the first three quarters of the year. Staff projections suggested that real economic activity would continue to recede in the first half of 1975; that the rate of increase in prices, while still rapid, would moderate; and that nominal GNP would continue to grow at a slow pace.

In December retail sales had risen somewhat, according to the advance estimate, after having declined considerably in the preceding 3 months. The index of industrial production fell sharply further in December; curtailments in output were large and widespread in part because of efforts to liquidate inventories. Employment cutbacks also were widespread, especially among manufacturing establishments. The unemployment rate rose from 6.5 to 7.1 per cent, and the number of persons with only part-time jobs continued to increase.

Average wholesale prices of industrial commodities were unchanged in December—after having risen much less rapidly from August to November than earlier in the year—as declines in a number of basic commodities offset increases in machinery and other more highly fabricated products. Wholesale prices of farm and food products declined, following 2 months of substantial increases. During the final 3 months of 1974 the advance in the index of average hourly earnings for private nonfarm production workers was considerably less rapid than in the two previous quarters.

[1] This meeting began on the afternoon of January 20 and continued on the following day.

In his State of the Union message on January 15, the President set forth a program of fiscal stimulus, which included cash refunds of 1974 personal income taxes in two equal installments—in May and September of this year—and an increase for 1 year in the investment tax credit for businesses and farmers. The proposed tax reductions were estimated to amount to $12 billion for individuals and $4 billion for businesses and farmers. In addition, the President proposed excise taxes and import fees on petroleum and excise taxes on natural gas to reduce the use of these energy sources; removal of price controls from domestic crude oil to encourage production; and a tax to recover the windfall profits resulting from the decontrol of prices. The taxes and fees would yield $30 billion in Federal revenues, on an annual basis, which would be returned to the economy through a permanent reduction in taxes on corporate and individual incomes; through payments of up to $80 to low-income individuals, including some who would pay no Federal income taxes; and through certain other measures.

Staff projections for the first half of 1975 in essence were similar to those of 5 weeks earlier, although the declines now expected in real GNP were larger for the current quarter and smaller for the second quarter. The President's fiscal program, if enacted, was expected to improve the prospects for an upturn in economic activity in the second half of the year but to have little impact before then, apart from adding to disposable personal income toward the end of the second quarter. Accordingly, it was still anticipated that the rise in personal consumption expenditures would be little, if any, greater than the increase in prices; that the expansion in business fixed investment outlays would fall short of the increase in prices; that residential construction activity would decline further in the current quarter and then turn up; and that the rate of business inventory investment would fall substantially in the first quarter and then shift to liquidation in the next.

The exchange rate for the dollar against leading foreign currencies—which had been declining since early

September—fell somewhat further between mid-December and mid-January, in association with decreases in interest rates in this country relative to those in other major countries. The U.S. foreign trade deficit—after narrowing in September and October—remained moderate in November, as both exports and imports rose substantially. Oil-exporting countries continued to add to their investments in the United States, and large inflows and outflows of bank-reported private capital were roughly offsetting.

At U.S. commercial banks total loans and investments declined sharply from the end of November to the end of December, reflecting in large part decreases in outstanding loans to businesses and to nonbank financial institutions; banks reduced their over-all holdings of securities slightly. In contrast with immediately preceding months, businesses reduced their borrowings in the commercial paper market as well as at banks, in part as a result of efforts to fund short-term debts. In early January most banks reduced the prime rate applicable to large corporations in two steps from 10½ per cent to 10 per cent, but reductions in the rate continued to lag behind declines in commercial paper rates.

Growth in the narrowly defined money stock (M_1)[2] slowed to an annual rate of about 2 per cent in December. Growth in the more broadly defined money stock (M_2)[3] also slowed as net inflows to banks of time and savings deposits other than money market certificates of deposit (CD's) declined sharply; however, net inflows of deposits to nonbank thrift institutions continued to improve. Over the fourth quarter as a whole, M_1 and M_2 grew at rates of 4 and nearly 7 per cent, respectively.[4] Weekly data indicated that M_1 had declined somewhat in early January but that inflows to banks of consumer-type time and savings deposits had picked up.

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[2] Private demand deposits plus currency in circulation.

[3] M_1 plus commercial bank time and savings deposits other than money market CD's.

[4] The growth rates cited for the quarter are calculated on the basis of the daily-average level in the last month of the quarter relative to that in the last month of the preceding quarter.

On January 20 the Board of Governors announced a reduction in reserve requirements on the net demand deposits of member commercial banks. The action—which would release about $1.1 billion in reserves to the banking system in the week beginning February 13—was designed to permit further gradual improvement in bank liquidity and to facilitate moderate growth in the monetary aggregates.

System open market operations since the December 16-17 meeting had been guided by the Committee's decision to seek bank reserve and money market conditions consistent with somewhat more rapid growth in monetary aggregates over the months ahead than had occurred in recent months, while taking account of developments in domestic and international financial markets. Data that had become available in the weeks immediately after the December meeting suggested that in the December-January period the aggregates would grow at rates near or below the lower limits of the ranges of tolerance that had been specified by the Committee. Consequently, System operations persistently had been directed toward further easing in bank reserve and money market conditions. In the statement week ending January 8, the Federal funds rate had averaged slightly below 7¾ per cent—down from about 8¾ per cent at the time of the December meeting.

The data that became available on January 9 indicated still greater weakness in the aggregates; it appeared that M_1 and M_2 would grow in the December-January period at rates well below the lower limits of the specified ranges of tolerance. The System currently was conducting reserve-supplying operations thought to be consistent with a weekly average funds rate at about the 7½ per cent lower limit of its specified range of tolerance. Against the background of those developments and to give the Manager greater flexibility, Chairman Burns recommended on January 9 that the lower limit of the funds rate constraint be reduced to 7⅛ per cent for the period remaining until the next Committee meeting. The members of the Committee concurred, and over most of that period the funds rate was slightly above 7 per cent.

Short-term market interest rates declined substantially further over the inter-meeting period, in response to the weakening in business demands for short-term credit, to System open market operations to ease bank reserve and money market conditions, and to a reduction in Federal Reserve discount rates. Discount rate reductions of ½ of a percentage point, to 7¼ per cent, at six Reserve Banks were announced on January 3, to be effective on January 6; shortly thereafter, rates were reduced at the remaining six Banks. Over the inter-meeting period the market rate on 3-month Treasury bills declined nearly three-fourths of a percentage point, to about 6.40 per cent, and rates on private short-term instruments declined considerably more.

Yields on longer-term bonds in general changed little in the inter-meeting period—despite the declines in short-term rates—because corporate financing in the capital market had been and was expected to remain substantial and prospective Treasury financings were large. The volume of public offerings of corporate bonds in December was exceptionally heavy for that season, and a near-record volume was in prospect for January. In the home mortgage market contract interest rates on new commitments for conventional mortgages in the primary market and yields on commitments in the secondary market for Federally underwritten mortgages declined further from early December to mid-January.

The Treasury was expected to announce shortly the terms of its mid-February refunding. Of the maturing issues, $3.55 billion were held by the public.

The Committee decided that the economic situation and outlook called for more rapid growth in monetary aggregates over the months ahead than had occurred in recent months. A staff analysis suggested that—although M_1 was not expanding in January—the demand for money would pick up in February, in part as a result of the lagged effects of earlier declines in interest rates. Nevertheless, it appeared likely that if M_1 were to grow at a rate consistent with the Committee's longer-run objectives for the monetary aggregates, money market conditions would have to ease further in the period immediately

ahead. It was expected that net inflows of consumer-type time and savings deposits to banks and to nonbank thrift institutions would be relatively strong. Demands for bank credit appeared likely to be moderate.

The Committee concluded that growth in M_1 and M_2 over the January-February period at annual rates within ranges of tolerance of 3½ to 6½ per cent and 7 to 10 per cent, respectively, would be consistent with its longer-run objectives for the monetary aggregates. The members agreed that such growth rates would be likely to involve growth in reserves available to support private nonbank deposits (RPD's) within a range of tolerance of 6¼ to 9¼ per cent. They also agreed that in the period until the next meeting the weekly average Federal funds rate might be expected to vary in an orderly fashion within a range of 6½ to 7¼ per cent, if necessary in the course of operations.

The members also agreed that, in the conduct of operations, account should be taken of the forthcoming Treasury financing and of developments in domestic and international financial markets. It was understood that the Chairman might call upon the Committee to consider the need for supplementary instructions before the next scheduled meeting if significant inconsistencies appeared to be developing among the Committee's various objectives and constraints.

The following domestic policy directive was issued to the Federal Reserve Bank of New York:

> The information reviewed at this meeting suggests that real output of goods and services fell sharply in the fourth quarter of 1974 and that further declines are in prospect for the months immediately ahead. In December declines in industrial production and employment again were sharp and widespread, and the unemployment rate increased from 6.5 to 7.1 per cent. Average wholesale prices of industrial commodities were unchanged, after having risen much less rapidly from August to November than earlier in the year, and prices of farm and food products declined. In recent months

increases in average wage rates have been large, but not so large as in the spring and summer.

In his State of the Union message, the President set forth a program of fiscal stimulus, including tax rebates for individuals and a temporary increase in the investment tax credit for business. The President also proposed a new program to reduce the consumption of energy; the program includes new taxes in the energy area along with measures of tax relief that, on balance, are designed to have a neutral effect on the size of the Federal deficit.

The dollar in December and early January continued the gradual decline against leading foreign currencies that began in September. In November, as in October, the U.S. foreign trade deficit was moderate; sizeable inflows of official funds from oil-exporting countries continued, while other capital inflows and outflows reported by banks were roughly offsetting.

The narrowly defined money stock grew at an annual rate of 4 per cent over the fourth quarter of 1974, while the more broadly defined measure of the stock grew at a rate of nearly 7 per cent. In December and early January, however, the narrowly defined money stock changed little. Net inflows of consumer-type time and savings deposits at banks slowed sharply in December, although they continued to improve at nonbank thrift institutions; in early January deposit inflows at banks picked up. Business demands for short-term credit, both at banks and in the commercial paper market, moderated further in December, while demands in the long-term market remained strong. Over recent weeks short-term market interest rates have declined substantially, but yields on long-term securities have changed little, on balance. Federal Reserve discount rates were reduced from 7¾ to 7¼ per cent in early January, and on January 20 the Board announced a reduction in reserve requirements on demand deposits estimated to release $1.1 billion in required reserves.

In light of the foregoing developments, it is the policy of the Federal Open Market Committee, while resisting inflationary pressures and working toward equilibrium in the country's balance of payments, to foster financial conditions conducive to cushioning recessionary tendencies and stimulating economic recovery.

To implement this policy, while taking account of the forthcoming Treasury financing, developments in domestic and international financial markets, and the Board's action on reserve requirements, the Committee seeks to achieve bank reserve and money market conditions consistent with more rapid growth in monetary aggregates over the months ahead than has occurred in recent months.

Votes for this action: Messrs. Burns, Black, Bucher, Clay, Coldwell, Holland, Kimbrel, Mitchel, Sheehan, Wallich, Winn, and Debs. Votes against this action: None.

Absent and not voting: Mr. Hayes, (Mr. Debs voted as alternate for Mr. Hayes.)

Subsequent to the meeting, on February 5, the available data suggested that in January M_1 had declined sharply and that growth in M_2 had been only modest. Growth rates for the January-February period appeared to be well below the lower limits of the ranges of tolerance specified by the Committee. The weakness in the monetary aggregates wholly reflected the behavior of demand deposits; growth in consumer-type time deposits remained relatively strong. The System Account Manager currently was endeavoring to supply reserves at a rate thought to be consistent with a Federal funds rate of 6½ per cent, the lower limit of the range of tolerance that had been specified by the Committee. On February 5 a majority of the members concurred in the Chairman's recommendation that, in light of those developments and of the reduction in discount rates effective that day, the lower limit of the funds rate constraint be reduced to 6¼ per cent. Mr. Sheehan did not concur, because he preferred to reduce the lower limit of the

funds rate constraint to 6 per cent, rather than 6¼ per cent.

2. *Amendment to authorization for domestic open market operations*

On January 30 the Committee members voted to amend a provision of paragraph 2 of the authorization for domestic open market operations, which specified that a Reserve Bank other than the New York Bank could purchase special certificates of indebtedness directly from the Treasury only if the latter Bank was closed, by striking the word "if" in the clause "or, if the New York Bank is closed," and inserting in its place the words "under special circumstances, such as when. . . ." With this amendment, paragraph 2 read as follows:

> The Federal Open Market Committee authorizes and directs the Federal Reserve Bank of New York, or, under special circumstances, such as when the New York Reserve Bank is closed, any other Federal Reserve Bank, to purchase directly from the Treasury for its own account (with discretion, in cases where it seems desirable, to issue participations to one or more Federal Reserve Banks) such amounts of special short-term certificates of indebtedness as may be necessary from time to time for the temporary accommodation of the Treasury; provided that the rate charged on such certificates shall be a rate ¼ of 1 per cent below the discount rate of the Federal Reserve Bank of New York at the time of such purchases, and provided further that the total amount of such certificates held at any one time by the Federal Reserve Banks shall not exceed $1 billion.

Votes for this action: Messrs. Burns, Black, Bucher, Clay, Coldwell, Holland, Mitchell, Sheehan, Winn, Baughman, and Debs. Votes against this action: None.

Absent and not voting: Messrs. Hayes, Kimbrel, and Wallich. (Mr. Debs voted as alternate for Mr. Hayes and Mr. Baughman voted as alternate for Mr. Kimbrel.)

This action was taken on the recommendation of the Account Manager, who had advised Committee members that under certain circumstances involving holidays not uniformly celebrated throughout the country it would be convenient for the Treasury if the authority for Reserve Banks other than New York to purchase special Treasury certificates of indebtedness was not confined exclusively to times when the New York Reserve Bank was closed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0736

DAVID R. MERRILL, ET AL., PLAINTIFFS

v.

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, DEFENDANT

DEFENDANT'S OPPOSITION TO PLAINTIFFS' STATEMENT PURSUANT TO LOCAL RULE 9 (G) OF MATERIAL FACTS WHICH ARE NOT IN ISSUE

Defendant, by its undersigned attorneys, hereby objects to plaintiffs' Statement Pursuant to Local Rule 9(g) of Material Facts which are not in issue on the ground that plaintiffs' Statement sets forth conclusions of law and not statements of material fact, and is generally not a complete statement of the material facts which are not in issue. The Court is respectfully referred to the 9(g) Statement filed by the defendant for the material facts which are not in issue in this suit.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0736

DAVID R. MERRILL, PLAINTIFF

v.

FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, DEFENDANT

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS WHICH ARE NOT IN ISSUE

Pursuant to Local Rule 9(g), plaintiff objects to the following enumerated paragraphs in Defendant's Statement of Material Facts Which Are Not In Issue:

1. Plaintiff objects to ¶¶ 4-8, 10, 20, subparagraph 2 of ¶ 9, and the second sentence in ¶ 11, because they contain statements of alleged fact that are irrelevant to the issues presented here.
2. Plaintiff objects to ¶¶ 21 through 24, and to the second sentence in ¶ 19, because they set forth arguments and not statements of material facts.

Respectfully submitted,

/s/ Victor H. Kramer
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/s/ Richard B. Wolf
RICHARD B. WOLF

/s/ Charles E. Hill
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0736

DAVID R. MERRILL, PLAINTIFF

v.

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, DEFENDANT

MOTION TO AMEND FINDINGS

Defendant, by its undersigned attorneys, pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure, hereby moves this Court to amend its findings to reflect that the Records of Policy Action are exempt from the compelled disclosure provisions of the Freedom of Information Act (FOIA) pursuant to 5 U.S.C. 552(b)(2) and (5) and the exercise of this Court's equitable discretion, and, to reflect that in any event, the availability of these records at the expiration of forty-five (45) days from the meeting about which they were prepared, is consistent with the FOIA's requirement of prompt disclosure. In consideration of these amended findings the Court is urged to amend its oral ruling to deny plaintiff's motion for summary judgment and grant the defendant's motion for summary judgment with respect to the Records of Policy Action.

In support of this motion the Court is respectfully referred to the affidavits filed in support of defendant's motion for summary judgment and the memorandum of points and authorities filed herewith.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0736

DAVID R. MERRILL, ET AL., PLAINTIFFS

v.

FEDERAL OPEN MARKET COMMITTEE OF THE
FEDERAL RESERVE SYSTEM, DEFENDANT

AFFIDAVIT

I, Robert C. Holland, being first duly sworn depose and say as follows:

1. I am a member of the Board of Governors of the Federal Reserve System. I was appointed to the Board by President Nixon effective June 11, 1973. I am also by statute a member of the Federal Open Market Committee (FOMC). I originally joined the Federal Reserve System in 1949 as a Financial Economist for the Federal Reserve Bank of Chicago where I was later appointed Assistant Vice President (Research) in 1957 and Vice President (Loans) in 1959. I joined the Board's staff in 1961 and held various official positions in the Division of Research and Statistics from 1961 until 1965. The Division of Research and Statistics provides the Board and the Federal Open Market Committee with the economic analysis and information needed for the formulation of monetary and credit policies and conducts research relating to the effects of monetary policy. I also served as Associate Economist, Federal Open Market Committee, from 1962 until 1966 and as Secretary of the Federal Open Market Committee from 1966 until 1973. From 1965 until 1967, I served as Adviser to the Board of Governors. I was Secretary of the Board from 1968 until 1971 and I became Executive Director of the Board in 1971, a position I held until my appointment as a Member of the Board. I hold the

degrees of Bachelor of Science in Finance from the Wharton School of Finance and Commerce, University of Pennsylvania, and a Master of Arts and Doctor of Philosophy in Economics from the University of Pennsylvania.

2. I hereby expressly reaffirm each and every statement in my affidavit previously submitted to the Court in this case, dated October 24, 1975. In addition, I have read the affidavit of Stephen H. Axilrod, dated October 24, 1975, and the affidavit of Peter D. Sternlight, dated October 21, 1975, both of which were previously submitted to the Court in this case; and I concur in all statements made and positions taken by Messrs. Axilrod and Sternlight in those affidavits. In the present affidavit, I endeavor to clarify certain points previously made in the above-mentioned affidavits by myself and by Messrs. Axilrod and Sternlight.

3. The aforementioned affidavits detail the adverse consequences for the U.S. economy of premature public disclosure of the FOMC's Records of Policy Actions and of its Domestic Policy Directives. The Records of Policy Actions summarize the FOMC's assessment of the country's economic and financial position at the time of each meeting as well as the Committee's views regarding the appropriate course for open market operations during the period ahead. These Policy Records summarize the deliberations taking place at each FOMC meeting and record the guidelines given by the Committee to its agent, the System Open Market Account Manager, for use in conducting open market operations during the period ahead. Some of these guidelines are formalized as 'policy directives' and are printed single-spaced in the Records of Policy Actions. The 'policy directive' relating to open market operations in the domestic securities market is called the Domestic Policy Directive.

The Domestic Policy Directives are routinely made available for public inspection 45 days after each FOMC meeting along with, and as part of, the corresponding Records of Policy Actions. These two documents record the process by which the FOMC performs the function

entrusted solely to it by Congress: direction and regulation of the conduct of open market operations by the Federal Reserve System. See 12 U.S.C. § 263. The FOMC does not adjudicate the rights of individual persons or corporations on applications for licenses or other like approvals; nor does the FOMC issue regulations or take other actions that require particular actions or forbearances by individual members of the public. Rather the FOMC analyzes and evaluates economic conditions in the country with a view toward formulating an approach to influencing the availability and cost of money and credit through the injection and absorption of bank reserves by means of purchases and sales of government securities. The original Federal Reserve Act placed the power to conduct open market operations in the twelve regional Federal Reserve Banks (§ 14, 38 Stat. 251); however, the Banking Acts of 1933 and 1935 created the FOMC, giving it this power previously exercised by the Reserve Banks (48, Stat. 162; 49, Stat. 684).

4. Open market operations are manifestly unlike other kinds of activities typically performed by government agencies. These open market operations consist of purchases and sales of securities—chiefly U.S. Government securities—by the FOMC's agent at the Federal Reserve Bank of New York, in accordance with guidelines and instructions formulated by the FOMC. The guidelines and instructions to the agent are embodied in the Domestic Policy Directive, which is in turn made a part of the Record of Policy Actions for each meeting of the FOMC. The Policy Record summarizes the deliberations of the FOMC leading to the Domestic Policy Directive and sets forth the market strategy agreed upon by the FOMC, including among other things, ranges of tolerance that the FOMC believes acceptable for growth in various measures of the money supply, and for changes in the Federal funds rate—that is, the rate charged for one-day inter-bank loans of excess reserve balances.

5. When the FOMC pays for government securities that it buys, it issues a check to the selling dealer drawn on the nation's central bank, the Federal Reserve. The

net effect of this transaction is to add to the reserves of the nation's banking system, and thus to provide a basis for the creation by the system of additional demand deposit balances. Since demand deposits are the nation's principal medium of exchange, this means of adding to bank reserves in effect creates an additional supply of money in the economy. Conversely, when the FOMC sells securities in the open market, bank reserves are contracted and the base of the money supply is reduced. Open market operations thus directly and immediately influence the amount of money available for use in the U.S. economy. Enormous sums of money are involved in these transactions. In 1974, for example, the total dollar volume of outright transactions in U.S. Government securities by the FOMC was approximately $19.4 billion, and the total dollar volume of matched sale-purchase transactions and repurchase agreements was approximately $135 billion. The FOMC is an extremely large and significant participant in the market for U.S. Government securities.

6. The Federal funds rate is a key market interest rate. It is the rate at which commercial banks are willing to buy and sell, among themselves, excess reserves on an overnight basis. Changes in the volume of bank reserves influence the Federal funds rate by encouraging or discouraging commercial banks from buying or selling excess reserves on an overnight basis. Historically, a close relationship can be shown between fluctuations in the Federal funds rate and fluctuations in other key market interest rates. Changes in the availability of reserves also influence loans and investments by commercial banks and bring about changes in the money supply. These changes in bank reserves and the money supply in turn influence interest rates, employment, and other key economic indicators.

7. The FOMC's agent (the System Open Market Account Manager) is guided in his day-to-day operations by the Domestic Policy Directive, by the tolerance ranges for the money supply and the Federal funds rate subsequently reported in the Record of Policy Actions, and by a daily conference call with the staff and at least one

member of the FOMC. A wide variety of options are available to the Manager each day: he may buy or sell any quantity of several different kinds of securities with or without conditions (such as repurchase agreements), or he may do nothing at all. The choice of method is the Manager's; but in making that choice he must consider the FOMC's guidelines in light of developing conditions in the market. In affecting bank reserve availability and hence the Federal funds rate, he also considers the *pace* at which the FOMC desires to effect changes in the rate of growth or contraction of the money supply and changes in other key indicators, such as the liquidity position of banks and other financial institutions. Frequently the FOMC prefers gradual change in market conditions to abrupt market reaction. Economic and financial *stability* is a prime objective of a central bank; and gradual change is often desirable in order to minimize the risk that businessmen, consumers, and investors will overreact and cause economic conditions to worsen, either in the direction of inflation or of recession.

8. The ability of the FOMC to perform its monetary policy functions is likely to be seriously impeded if the other major participants in the U.S. Government securities market know in advance what the FOMC is going to do. These other major participants include the Government securities dealers—chiefly investment firms and departments of large commercial banks who trade principally, if not exclusively, for their own account. Advance knowledge of the FOMC's intentions would cause these other participants to act to maximize their profits by immediately buying or selling to take advantage of changes which they expect the FOMC's anticipated actions to produce. As indicated in the three above-mentioned affidavits by myself and Messrs. Axilrod and Sternlight, however, these speculative adventures by large commercial banks and investment houses can frustrate achievement of the gradual changes usually desired by the FOMC and thus frustrate achievement of the FOMC's monetary policy objectives. A further danger is that speculators—who cannot predict, as accurately as can

the FOMC, future market conditions to which the Directive would apply—might very well incorrectly predict the Manager's actions after reading the FOMC's Directive and Policy Record, and consequently act in the market in a manner inconsistent with the FOMC's objectives. In short, if the Directive and Policy Record are released during the period in which the Directive is effective, the FOMC's monetary policy objectives may well be frustrated. Since it is the FOMC, and no one else, that is entrusted by Congress with the power and responsibility for fostering monetary and economic stability through open market operations, forced premature disclosure of the Directive and Policy Record is likely to produce consequences contrary to the public interest in economic and financial stability.

9. That participants in the market for U.S. Government securities will use such advance information for speculative purposes is as certain as is the continuing desire for profits by people who invest their money in stocks and bonds. For example, if market participants believed, after viewing the Committee's Domestic Policy Directive and ranges of tolerance for growth in the money supply and fluctuations in the Federal funds rate, that the odds favor a rise in interest rates, they would react immediately by selling securities which would tend to push up interest rates and to push down securities prices. Alternatively, if market participants concluded that interest rates would go down as the Manager operated under the Committee's guidelines, they would react in a manner consistent with that judgment and would, as a result, cause interest rates to go down and securities prices to go up. Such movements may be contrary to the Committee's intentions. The only persons benefitting from such speculation-induced movements would be the speculators themselves—the public would be harmed through possible frustration of the FOMC's efforts to achieve certain monetary policy objectives.

10. Premature public disclosure of the FOMC's Records of Policy Actions, within the 45-day period immediately following each meeting of the FOMC, would

thus most likely result in two principal adverse consequences: (1) interference with orderly and effective execution of the FOMC's policies and transactions through unnecessary and unwarranted disturbances in the securities market caused by such disclosures, and (2) the gaining of unfair profits and advantages by market participants engaged in the speculative trading of Government and other securities. These adverse consequences are likely to occur if the entire Record of Policy Actions —including the Domestic Policy Directive, the ranges of tolerance for the Federal funds rate and for growth in the money supply, and other information—is released prematurely. Similar consequences can also occur even if only the Domestic Policy Directive is released prematurely.

11. The tolerance ranges found in the record of this case are contained in the Records of Policy Actions for the FOMC meetings held in January and February, 1975. For January, 1975, these ranges were 3½-6½ per cent growth for M_1, 7 to 10 per cent growth for M_2, and 6½ to 7¼ per cent for the Federal funds rate. The corresponding tolerance ranges for February, 1975 were 5½-7½ per cent for M_1, 6½-8½ per cent for M_2, and 5¼-6¼ per cent for the Federal funds rate. M_1 is a definition of the money supply that includes currency in circulation and demand deposits held by the public in commercial banks. M_2 is a definition of the money supply that includes M_1 plus time and savings deposits, other than large negotiable certificates of deposit, held in commercial banks. The FOMC disclosed these Policy Records to the public, in accordance with its rules, after expiration of a period long enough, in its judgment, to minimize the risk of adverse consequences.

12. To be truly meaningful, the above tolerance ranges must be read in conjunction with the corresponding Domestic Policy Directives. The different kinds of guidance that these Directives may contain are illustrated by the following three excerpts of operative language from three Domestic Policy Directives from designated FOMC meetings:

Meeting held on December 17-18, 1973:

In light of the foregoing developments, it is the policy of the Federal Open Market Committee to foster financial conditions conducive to resisting inflationary pressures, cushioning the effects on production and employment growing out of the oil shortage, and maintaining equilibrium in the country's balance of payments.

To implement this policy, while taking account of international and domestic financial market developments, the Committee seeks to achieve some easing in bank reserve and money market conditions, provided that the monetary aggregates do not appear to be growing excessively.

Meeting held on February 19, 1975:

In light of the foregoing developments, it is the policy of the Federal Open Market Committee to foster financial conditions conducive to cushioning recessionary tendencies and stimulating economic recovery, while resisting inflationary pressures and working toward equilibrium in the country's balance of payments.

To implement this policy, while taking account of developments in domestic and international financial markets, the Committee seeks to achieve bank reserve and money market conditions consistent with more rapid growth in monetary aggregates over the months ahead than has occurred in recent months.

Meeting held on November 18, 1975.

In light of the foregoing developments, it is the policy of the Federal Open Market Committee to foster financial conditions that will encourage continued economic recovery, while resisting inflationary pressures and contributing to a sustainable pattern of international transactions.

To implement this policy, while taking more than usual account of developments in domestic and international financial markets, the Committee seeks to achieve bank reserve and money market conditions consistent with moderate growth in monetary aggregates over the months ahead.

13. Phrases such as "conditions consistent with moderate growth in monetary aggregates over the months ahead," "conditions consistent with more rapid growth in monetary aggregates over the months ahead than has occurred in recent months," and "some easing in bank reserves and money market conditions, provided that the monetary aggregates do not appear to be growing excessively" appear often in these Domestic Policy Directives. Such phrases are *terms of art* that have meaning when read by knowledgeable market participants. These participants are students of past Policy Records and Directives and would often be able, from the Directive alone, to reach an educated guess to what the tolerance ranges are. Speculative inclinations would encourage at least some market participants to enter the market on the basis of these guesses. The FOMC's objective of gradual change, while appraising market developments on the basis of incoming information, would be frustrated. Moreover, an incorrect guess may well, as set out above and in the above-mentioned affidavits, aggravate the adversity of the consequences that can flow from the participants' speculative adventures. Thus premature release of the Domestic Policy Directive alone, like premature release of the entire Record of Policy Actions, carries with it the likelihood of substantial impairment of the FOMC's efforts to achieve its monetary policy objectives.

14. One way in which premature release of the Domestic Policy Directive alone could bring about adverse consequences like those that would attend premature release of the entire Record of Policy Actions is illustrated in the following example:

At the meetings in January and February 1975 (those for which the policy records were initially requested by the plaintiff) the Committee's policy directive called (in its final paragraph) for "more rapid growth in monetary

aggregates over the months ahead than has occurred in recent months." It would be reasonable for market participants to infer from such language that the Account Manager was likely to be buying a substantial volume of Government securities (because such purchases have the effect of expanding bank reserves, and therefore bank lending activity) or would be selling less than he might otherwise. Astute market observers (who know that, in response to seasonal pressures, the FOMC normally sells securities in January) would infer that the Account Manager would sell fewer securities than would normally be the case. It would also be reasonable for market participants to infer that because of such activities, securities prices would be higher than they otherwise would have been. Access to this information would thus have the effect of giving market participants an incentive to buy Government securities, or to buy more than they otherwise would have, or to defer planned sales—all of which would serve to drive the prices of Government securities up soon after the information was released. In this process, those participants who had the expertise and financial resources to react quickly and in volume could earn large speculative profits.

15. Such market reactions to release of the FOMC's decision could impede the effective implementation of the Committee's policies in various ways. First, the movement of securities prices and interest rates is likely to to be abrupt, as market participants hasten to realize gains, whereas the Committee customarily seeks gradual changes. Second, the movement might often be considerably larger than the Committee contemplated. Third, the inferences about the *direction* of change in securities prices and interest rates that market participants might reasonably draw from information on particular policy decisions can, under certain circumstances, be incorrect, so that their actions would tend to drive prices and rates in the direction opposite of that intended by the Committee.

In all of these cases, the Committee would lose some degree of control over the consequences of its own decisions, and might often find it necessary to call for additional

operations for the sole purpose of offsetting the unintended effects of the publication of its decision. The fluctuations in securities prices and yields that attended this process could have damaging effects on the financial industry and could inhibit the financing operations of the U.S. Treasury and of other public and private bodies.

/s/ Robert C. Holland
ROBERT C. HOLLAND

Subscribed and sworn to before me this 24th day of February, 1976

/s/ [Illegible]
Notary Public

My Commission Expires Nov. 30, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0736

DAVID R. MERRILL, ET AL., PLAINTIFFS

v.

FEDERAL OPEN MARKET COMMITTEE OF THE
FEDERAL RESERVE SYSTEM, DEFENDANT

[Filed Mar. 9, 1976]

ORDER AND JUDGMENT

Upon consideration of the pleadings, cross-motions for summary judgment, the affidavits and exhibits filed herein, and the entire record, and the Court having filed its Memorandum Opinion including its Findings of Fact and Conclusions of Law,

It is by the Court this 9th day of March, 1976,

ORDERED, ADJUDGED and DECLARED:

1. That plaintiff's motion for summary judgment be, and the same hereby is, granted;

2. That defendant's motion for summary judgment be, and the same hereby is, denied;

3. That defendant has acted unlawfully and contrary to its obligation of prompt disclosure under subsection (a) of the Freedom of Information Act, 5 U.S.C. § 552, by promulgating and enforcing 12 C.F.R. § 271.5, as amended March 24, 1975, 40 Fed. Reg. 13204, insofar as it provides for a 45 day delay in the public disclosure of defendant's Domestic Policy Directive and other policy actions after their adoption, and defendant's "Records of Policy Actions" after their approval;

4. That defendant's practice of delaying the release of reasonably segregable factual portions of the memoranda of discussion of defendant's meetings is unlawful

and contrary to its obligation of prompt disclosure under subsection (a)(3) of the Freedom of Information Act, 5 U.S.C. § 552;

5. That defendant shall cease to give effect to or in any way enforce 12 C.F.R. § 271.5 insofar as it provides for a delay in the public disclosure of defendant's policy actions after their adoption and defendant's "Records of Policy Actions" after their approval;

6. That defendant shall currently publish in the Federal Register its Domestic Policy Directive upon the adoption of said Directive with no delay in publication other than that occasioned by the normal process of publication in the Federal Register;

7. That defendant shall make its other policy actions, including statements and interpretations of policy, available for public inspection and copying upon their adoption unless said policy actions are promptly published with no attendant delay other than that occasioned by the normal publication process;

8. That defendant shall make all portions of its "Records of Policy Actions" which are not statements and interpretations of policy promptly available to the public upon the adoption of said "Records of Policy Actions."

9. That defendant shall promptly make available to the plaintiff, for inspection and copying, those reasonably segregable factual portions of the memoranda of discussion of the Federal Open Market Committee meetings of January 20-21, 1975, and February 19, 1975;

10. That should the defendant claim that the January 20-21, 1975, memorandum of discussion and/or the February 19, 1975, memorandum of discussion contain factual portions which are not reasonably segregable, it shall produce the memoranda to the Court within ten days for *in camera* inspection;

11. That defendant's motion to amend the Court's findings at the hearing on the cross-motions for summary judgment be, and the same hereby is, denied.

12. That defendant's motion to stay this ORDER as it relates to the defendant's records of policy actions be, and the same hereby is, granted and Paragraphs 5, 6, 7 and 8 of this Order and Judgment are hereby

stayed and shall not take effect for 10 days from the date hereof or until further order of the Court in the event notice of appeal is filed within said 10 days.

13. That plaintiff's prayer for counsel fees be and the same hereby is held in abeyance pending the disposition of any appeal in this case or until further order of this Court.

/s/ Joseph C. Waddy
JOSEPH C. WADDY
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 77-1387

FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

DAVID R. MERRILL

ORDER ALLOWING CERTIORARI

Filed May 22, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 269837 55

No. 77-1387

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

THE FEDERAL OPEN MARKET COMMITTEE
OF THE FEDERAL RESERVE SYSTEM,

Petitioner,

v.

DAVID R. MERRILL,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Hearings on H.R. 9465 and H.R. 9589 Before the Subcommittee on Domestic Monetary Policy of the House Committee on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. (1977) 8

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1387

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM,

Petitioner,

v.

DAVID R. MERRILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether a federal agency may temporarily withhold from public disclosure final and effective statements

of policy required to be disclosed promptly by the Freedom of Information Act, where the justification for delay is that prompt disclosure may have an adverse effect on the implementation of the agency's policy.

ARGUMENT

The issue presented by this petition raises a question as to the applicability of the Freedom of Information Act to the monthly policy statements of the Federal Open Market Committee of the Federal Reserve System. The petition cites no conflict among the circuits nor, we respectfully submit, does it raise any broad issue of public policy. We believe that the judgment of the district court and the unanimous decision of the court of appeals affirming the district court are clearly correct. Even if the opinion and judgment below were erroneous, we submit that

the issue raised by the petition is not of sufficient importance to warrant review by this Court.

The policy statements at issue are subject to disclosure under § 552(a)(1)(D) and § 552(a)(2)(B) of the Freedom of Information Act (Pet. App. A, p. 6A; Pet. App. C, pp. 38A-40A). In NLRB v. Sears, Roebuck & Co., this Court noted its "reluctan[ce] . . . to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2)." 421 U.S. 132, 153 (1975) (see Pet. App. A, p. 13A n. 17).[1/]

1/ Although § 552(a)(1)(D) and § 552(a)(2)(B) both require disclosure of statements of policy, § 552(a)(1)(D) requires the current publication of statements of general policy. Therefore, we assume that this Court's reluctance, as expressed in Sears, extends with even more force to § 552(a)(1)(D) statements of general policy.

Petitioner Federal Open Market Committee ("FOMC") makes three points in support of its petition. Each of them is unpersuasive.

1. First, petitioner asserts that the legislative history of the Freedom of Information Act, 5 U.S.C. § 552, though not the language of the Act, demonstrates that Exemption 5, 5 U.S.C. § 552(b)(5), was designed not only to protect the deliberative process of agencies, but also "to protect against the premature disclosure of agency plans" if such disclosure would impede agency performance or otherwise harm the public interest (Pet. 12) (emphasis in original).[2/] It is urged, therefore,

2/ Arguing that these two purposes are tied, counsel for petitioner suggests that, if the judgment below is allowed to stand, to combat the effects of prompt disclosure of its statements of policy the Federal Open Market Committee might adopt for public consumption written policy statements that do [footnote continued on following page]

that Exemption 5 allows the delayed disclosure of agency policy statements (Pet. 16-17).

In support of this point petitioner quotes language from the House Report on the Act, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6, 10 (1966) and cites the Senate Report on the Act, S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (Pet. 13-14).[3/] The court of

[footnote continued from preceding page] not accurately reflect its actual policy decisions (Pet. 12 n. 8). By this suggestion counsel attributes to the FOMC a degree of underhandedness that is unworthy of the Committee.

3/ Petitioner implies that this language represents Congress' response to testimony by the Department of the Treasury concerning premature disclosure of information about Federal Reserve System purchases (Pet. 13). However, that testimony was given in support of a catch-all general interest exemption, and not an amendment to Exemption 5. Hearings on H.R. 5012 Before the House Committee on Government Operations, 89th Cong., 1st Sess. 49-51 (1965).

appeals examined this very language and concluded that it did not support petitioner's position (Pet. App. A, pp. 11A-14A). The quoted language refers to predecisional material and material that, although final, is not yet effective. Because the policy statements at issue are both final and effective, they do not fall within this language.[4/] The court of appeals correctly concluded that such "[a]mbiguous inferences from legislative history cannot supplant the clear mandate of the language of the statute" (Pet. App. A, pp. 14A-15A).

Furthermore, the delay of more than a month urged by petitioner would, in effect, allow disclosure of policy

4/ Requiring the prompt disclosure of these final and effective policy statements has no bearing on the disclosure of the predecisional and/or not yet effective decisions referred to in the legislative history (compare Pet. 11, 14 with Pet. App. A, p. 12A n. 16).

statements only at a time when such policies had been superseded at the following monthly FOMC meeting (see Pet. 7; Pet. App. C, p. 41A). Such delay would contravene the Act's requirements of current publication, § 552(a)(1)(D), and prompt availability, § 552(a)(2)(B) (Pet. App. C, pp. 40A-41A; see Pet. App. A, p. 8A n. 11).

2. In petitioner's second and third points it asserts that the record contains affidavits demonstrating that prompt disclosure of its statements of policy "is likely to impede seriously the Committee's performance of its monetary policy functions" (Pet. 14),[5/]

5/ The judgment in this case was entered on a motion for summary judgment (Pet. App. C, p. 21A). We submit that the judgment and affirmance are correct as a matter of law even if the petitioner's affidavits are true.

Moreover, the affidavits cited by petitioner contain expressions of opinion as to economic consequences, and in the portion relied on here by

[footnote continued on following page]

and that the court of appeals' failure to consider the impact of disclosure on petitioner's operations was erroneous (Pet. 16).

We had supposed it clear from this Court's opinions that it was the Congress

[footnote continued from preceding page] petitioner, no facts are quoted. Corresponding opinions reaching precisely opposite conclusions are now a matter of public record. In comments submitted to the House Subcommittee on Domestic Monetary Policy, Professor Milton Friedman urged the immediate release of FOMC policy actions. Hearings on H.R. 9465 and H.R. 9589 Before the Subcommittee on Domestic Monetary Policy of the House Committee on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. 201-02 (1977) ("Hearings"). Professor William Poole noted that the FOMC's "policy intentions for money growth can be released promptly . . . without generating market disturbances." Hearings at 239. See generally S. Maisel, Managing the Dollar, 174-76 (1973) ("Maisel") (Mr. Maisel was a governor of the Federal Reserve Board and an FOMC member from 1965 to 1972).

Furthermore, both Professor Poole and former Governor Maisel have noted that market insiders profit from the delay in releasing policy statements to the prejudice of non-specialist investors and the public generally. Hearings at 238; Maisel at 174-75.

that balanced the opposing interests in adopting the Freedom of Information Act, thereby removing from the agencies and the courts difficult questions including the economic impact of compliance with the Act's disclosure commands and the public's need for disclosure. See, e.g., Department of Air Force v. Rose, 425 U.S. 352, 360-62 (1976); EPA v. Mink, 410 U.S. 73, 79-80 (1973).[6/]

6/ Petitioner's conduct during this case confirms that which was already clearly demonstrated under the old public records act; an agency's self-assessment of the need for secrecy is bound to err on the side of non-disclosure, contrary to the mandate of the Freedom of Information Act. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 4-6 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 3-5 (1965). As petitioner concedes (Pet. 7 n. 5), prior to the initiation of this lawsuit, petitioner believed that it was necessary to defer release of the policy statements for 90 days. Yet, during this suit petitioner first conceded that a 45-day delay is acceptable and now believes that only a 30-day delay is required.

As the court of appeals pointed out, it is the function of Congress, not the courts, to consider whether to amend the Freedom of Information Act if the ruling in this case, or any other under the Freedom of Information Act, would "impede implementation of national monetary policy" (Pet. App. A, p. 18A). That is precisely what the Congress is now considering as a result of the judgment in this case. There is a bill currently pending before the Senate Committee on Banking, Housing, and Urban Affairs "to amend the Federal Reserve Act to provide for deferral of the disclosure to the public of the Federal Open Market Committee's domestic policy directive." S. 2427, 95th Cong., 2d Sess., 124 Cong. Rec. S438 (daily ed. Jan. 25, 1978).

"The wisdom of the balance struck by Congress is not open to judicial scrutiny." Administrator, FAA v.

Robertson, 422 U.S. 255, 267 (1975). We think appropriate Mr. Justice Stewart's observation that the Court's "role is to interpret statutory language, not to revise it." Id. at 269 (Stewart, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 28, 1978

No. 77-1387

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

DAVID R. MERRILL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1387

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

DAVID R. MERRILL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 565 F. 2d 778. The opinion of the district court (Pet. App. 21a-45a) is reported at 413 F. Supp. 494.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on November 10, 1977. On January 27, 1978, the Chief Justice extended the time

within which to file a petition for a writ of certiorari to and including March 10, 1978, and on March 2, 1978, he further extended the time to and including April 9, 1978. The petition was filed on March 29, 1978, and was granted on May 22, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal agency may defer public disclosure of statements of final policy decisions required to be disclosed by the Freedom of Information Act, where the brief delay is necessary to permit effective implementation of the agency's policy.

STATUTE AND REGULATION INVOLVED

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> > (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
> >
> > * * * * *
> >
> > (D) * * * statements of general policy * * * formulated and adopted by the agency * * *.
> >
> > * * * * *
> >
> > (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
> >
> > * * * * *

> > (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; * * *
> >
> > * * * * *
> >
> > * * * unless the materials are promptly published and copies offered for sale. * * *
> >
> > * * * * *
> >
> > (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person,
>
> (b) This section does not apply to matters that are—
>
> > * * * * *
> >
> > (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

2. 12 C.F.R. 271.5 provides:

> (a) *Deferred availability of information.* In some instances, certain types of information of the Committee are not published in the FEDERAL REGISTER or made available for public inspection or copying until after such period of time as the Committee may determine to be reasonably necessary to avoid the effects de-

scribed in paragraph (b) of this section or as may otherwise be necessary to prevent impairment of the effective discharge of the Committee's statutory responsibilities.

(b) *Reasons for deferment of availability.* Publication of, or access to, certain information of the Committee may be deferred because earlier disclosure of such information would

(1) Interfere with the orderly execution of policies adopted by the Committee in the performance of its statutory functions;

(2) Permit speculators and others to gain unfair profits or to obtain unfair advantages by speculative trading in securities, foreign exchange, or otherwise;

(3) Result in unnecessary or unwarranted disturbances in the securities market;

(4) Make open market operations more costly;

(5) Interfere with the orderly execution of the objectives or policies of other Government agencies concerned with domestic or foreign economic or fiscal matters; or

(6) Interfere with, or impair the effectiveness of, financial transactions with foreign banks, bankers, or countries that may influence the flow of gold and of dollar balances to or from foreign countries.

STATEMENT

A. The Federal Open Market Committee

1. The Federal Reserve System was created by Congress in 1913 as the nation's central bank. 38 Stat. 251. From the inception of the System, the 12 regional Reserve Banks have had authority under Section 14 of the Federal Reserve Act, 38 Stat. 264, to purchase and sell government securities in the open market. This authority initially was quite limited, and the Reserve Banks usually used it to accumulate funds to meet operating expenses rather than to accomplish monetary policy objectives.

As Reserve Banks made more extensive use of their open market authority during and following World War I, however, it became clear that open market operations were creating disturbances in the government securities market and that purchases or sales by one Reserve Bank might work to the detriment of another Reserve Bank. In addition, the governors of the Reserve Banks recognized before long that coordinated open market operations could become an effective tool of national monetary policy. See U.S. Board of Governors of the Federal Reserve System, *Annual Report* (Tenth) 13 (1923).

In 1922, in response to these concerns, the Reserve Banks formed the Committee on the Centralized Execution of Purchases and Sales of Government Securities, whose functions were to execute open market decisions made by the individual Reserve Banks in such a manner as to avoid market

disruptions and to make occasional non-binding recommendations to the Reserve Banks on the advisability of purchasing or selling securities. See Beckhart, *Federal Reserve System* 41 (1972). This committee was superseded the following year by the Federal Open Market Investment Committee, which was organized by the Federal Reserve Board (by then well aware of the significant credit-control aspects of open market operations). It was given a mandate not only to coordinate Reserve Bank transactions in government securities but also to devise and recommend plans for directing, supervising and controlling these transactions. In establishing this committee, the Board resolved

> that the time, manner, character, and volume of open market investments purchased by Federal Reserve banks be governed with primary regard to the accommodation of commerce and business and to the effect of such purchases or sales on the general credit situation.

1923 *Annual Report*, *supra*, at 16. See also Hearings on H.R. 7895 before the House Committee on Banking and Currency, 69th Cong., 1st Sess. 864 (1926). Although this committee and its successor, the Open Market Policy Conference, made frequent recommendations consistent with these guiding principles, each Federal Reserve bank retained the power to decide whether to participate in open market operations and, if so, whether to follow the committee's proposals.

The first major alteration of this structure was made by the Banking Act of 1933, Section 8, 48 Stat. 162, which created the Federal Open Market Committee (FOMC), consisting of one representative from each Reserve Bank. Although the FOMC, like the Investment Committee and the Policy Conference, could do no more than make policy recommendations to the Board for the conduct of open market operations, the Reserve Banks for the first time were prohibited from engaging in such operations except in accordance with the Board's regulations. Individual Reserve Banks were left free, however, to decline to participate in operations recommended and approved by the Board. Hence, accomplishment of FOMC objectives still depended on Board approval and the willingness of the Reserve Banks to cooperate.

The last vestiges of Board and Reserve Bank authority were eliminated by the Banking Act of 1935, 49 Stat. 705, which established the present Federal Open Market Committee and gave it complete control over the open market operations of the entire Federal Reserve System. See generally *Reuss* v. *Balles*, C.A. D.C., No. 77-1012, decided July 7, 1978, slip op. 8. This statute, which (with minor amendments) is in effect today, prohibited Reserve Banks from either engaging or declining to engage in the purchase or sale of securities in the open market except in accordance with "the direction of and regulations adopted by the Committee."

2. The FOMC, which is composed of the seven members of the Board of Governors of the Federal Reserve System and five representatives of the Reserve Banks, supervises the open market operations of the System by authorizing and directing Reserve Bank

purchases and sales of government securities and certain other securities in the domestic securities market. These operations are conducted through a combined investment pool, called the System Open Market Account, by the System's Account Manager in New York, under guidelines and instructions from the Committee (A. 46).[1]

The FOMC employs open market operations to influence the availability and cost of bank reserves, bank credit and money (A. 31). The total volume of bank reserves is increased when the Account Manager purchases securities in the open market, since the payment ordinarily is deposited in the seller's bank and credited to that bank's reserve account in its regional Reserve Bank. By the same token, when the Account Manager sells securities the sales price typically is deducted from the reserve account of the buyer's bank, thereby decreasing the volume of reserves held by member banks.[2] Changes in the volume

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[1] The FOMC regularly designates the Federal Reserve Bank of New York as its agent for the conduct of open market operations and appoints a senior officer of that Bank as Manager of the System Account (A. 31, 48).

[2] Open market operations by the Account Manager involve enormous sums of money. In 1974, for example, the total dollar volume of outright purchases and sales of United States government securities by the FOMC was approximately $19.4 billion, and the total volume of matched sale-purchase transactions and repurchase agreements was approximately $135 billion (A. 78). The Board advises us that in 1977 these figures totalled approximately $29.6 billion and $617.7 billion. The Account Manager generally buys or sells securities outright for prompt delivery when projections indicate a need

of member bank reserves necessarily influence the ability of these banks to make loans and investments.[3] This in turn has a substantial effect on interest rates on money market instruments, including the federal funds rate,[4] and on interest rates in the economy as a whole (A. 46-47, 77-78).

The Federal Reserve System considers its open market operations to be the System's most important monetary policy instrument, not only because of their prompt and direct effect on the level of reserves, but also because open market operations, unlike other

---

to supply or to withdraw reserves for the banking system as a whole and this situation seems likely to persist for more than the current bank-statement-week. In situations where the need to provide or withdraw reserves seems only temporary, the Manager normally enters into repurchase agreements or matched sale-purchase transactions, neither of which has a lasting effect on the aggregate supply of reserves. See generally Federal Reserve Board, *The Federal Reserve System, Purposes and Functions* 60-65 (1974).

[3] Member banks are required by the Board's Regulation D, 12 C.F.R. Part 204, to hold reserves in a prescribed ratio to deposits. These banks typically respond to a reduction in the required reserve-to-deposit ratio or to an increase in available reserves by (i) making new loans and investments or (ii) selling their excess reserves to other member banks that are either short of reserves or need additional reserves in order to take advantage of particular lending and investment opportunities. As a result, deposits, loans and investments of the banking system expand almost to the limit permitted by the required reserve ratio (A. 47).

[4] The federal funds rate is the rate at which banks are willing to lend or borrow immediately available reserves on an overnight basis (A. 78). It is particularly sensitive to changes in the availability of reserves.

tools of monetary policy, are flexible and are in continuous use. This permits the FOMC to respond immediately to undesired changes in the economy, to implement changes gradually, and to probe in a given direction while maintaining the ability to withdraw from that course as necessary (A. 49, 53, 55).[5]

The FOMC meets approximately once a month to discuss policy objectives and to give policy guidance to the Account Manager for the period until the Committee's next meeting. The Committee's guidelines for the System's open market operations in the upcoming month are embodied in a Domestic Policy Directive, which is a statement of general monetary policy issued to the Federal Reserve Bank of New York (A. 47-48).[6] The Domestic Policy Directive includes the FOMC's objectives for the monetary aggregates;[7] these objectives are stated as tolerance

[5] Other major instruments of monetary policy include setting the discount rate and setting reserve requirements for commercial banks that are members of the Federal Reserve System. The instruments of monetary policy are complementary (A. 46).

[6] The affidavit of Governor Robert C. Holland of the Federal Reserve Board contains examples of the operative language of three Domestic Policy Directives (A. 82-83). See also A. 65-67.

[7] Monetary aggregates are the various definitions of the nation's money supply used by the Committee in its operations. The principal definitions are "M_1" and "M_2." "M_1" is the currency in circulation plus demand deposits held by the public in commercial banks, and "M_2" is "M_1" plus time and savings deposits, other than large certificates of deposit, held in commercial banks (A. 81).

ranges for growth of the money supply over specified periods of time and similar tolerance ranges for the federal funds rate (A. 43, 77).[8] From time to time, circumstances may require Committee members to consider changes in the tolerance ranges or other amendments to the Directive during the period between meetings (A. 43).

The Account Manager's day-to-day operations are guided by the Domestic Policy Directive, including the tolerance ranges for the money supply and federal funds rate, and by a daily conference call with the staff and at least one member of the FOMC. The Manager may buy or sell any quantity of several different kinds of securities, or he may do nothing at all. The choice of method is the Manager's, but in making that choice he must consider the Committee's instructions in light of developing conditions in the market (A. 78-79). Other members of the Committee are informed daily of the actions that the Manager expects to take in light of these conditions and the Committee's objectives (A. 48).

In transacting business for the System Open Market Account, the Manager trades with approximately 35 private dealers who actively make markets in United States government and federal agency securities. Approximately half of these dealers are

[8] For example, the tolerance ranges adopted in January 1975 were 3½ to 6½ percent growth for M_1, 7 to 10 percent growth for M_2, and 6½ to 7¼ percent for the federal funds rate (A. 81). (Prior to February 1977 the Committee did not incorporate the tolerance ranges in the Directive itself, but it expressed them in a supplement to the Directive.)

departments of large commercial banks, while the others include large, integrated brokerage firms and smaller firms specializing in the more active sectors of the Treasury and federal agency markets. All of these market participants buy principally, if not exclusively, for their own accounts (A. 33).

3. Section 10 of the Federal Reserve Act, as added, 49 Stat. 705, 12 U.S.C. 247a, requires the Board to keep a complete record of the actions taken by the FOMC on all questions of policy relating to open market operations.[9] The FOMC produces for each meeting a document called the Record of Policy Actions, which contains the Domestic Policy Directive (including the tolerance ranges) adopted at the meeting, the votes cast by Committee members in connection with open market policy, the reasons underlying the Committee's policy actions, and any dissenting views (A. 34, 42-44).

Pursuant to 12 C.F.R. 271.5, the Committee defers public availability of each month's Domestic Policy Directive until a few days after the following month's meeting.[10] Thereafter, the Directive is published in the *Federal Register*, made available for

[9] This section also directs the Board to make an annual report to Congress, including a full account of actions taken during the preceding year with respect to open market policies and operations.

[10] Prior to March 1975 the Committee deferred release of each Directive for 90 days (Pet. App. 5a n. 7). On March 24, 1975, the period of delay was shortened to 45 days. 40 Fed. Reg. 13204. The present policy was adopted on May 24, 1976. 41 Fed. Reg. 22261.

public inspection at the Board's Public Information Office as part of the Committee's Minutes of Actions,[11] and released to the press in the Record of Policy Actions (A. 42).[12]

B. The FOIA Litigation

On March 7, 1975, respondent, a law student with "a strong interest in administrative law and the operation of agencies of the federal government" and a desire to study "the process by which the FOMC regulates the national money supply through the frequent adoption of domestic policy directives" (A. 8), sought access under the Freedom of Information Act (FOIA), 5 U.S.C. 552, to the "Records of policy actions taken by the Federal Open Market Committee at its meetings in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies" (A. 13).

The FOMC advised respondent that, because of the Committee's delayed release policy, the records were not then available, but that they would be dis-

[11] The Minutes of Actions records all actions, including policy actions such as adoption of the Domestic Policy Directive, taken at the FOMC meeting (A. 35).

[12] The Record of Policy Actions is subsequently published in the monthly *Federal Reserve Bulletin* and in the Board's Annual Report (A. 44). The Board also publishes each week, or at other selected intervals, a number of statistical releases that disclose the results of the Committee's open market operations and much of the data on which its policy decisions are based (A. 36).

closed to the public in late March and early April 1975 (A. 15-16). Respondent appealed the delay in the release of the Records of Policy Actions (A. 19-20). By letter dated April 23, 1975, Governor Robert C. Holland of the Federal Reserve Board enclosed the requested documents, because by that time the 45-day withholding period then in effect had elapsed, but informed respondent that "the deferment of availability of such materials is founded upon a legislative policy against premature disclosures which would impair the effectiveness of the operations of Government agencies" (A. 21).[13]

Respondent commenced this litigation in May 1975 in the United States District Court for the District of Columbia, contending that 12 C.F.R. 271.5, under which the FOMC temporarily defers public release of the monthly Domestic Policy Directive and tolerance ranges, is contrary to the "prompt" disclosure requirements of the FOIA, 5 U.S.C. 552(a)(2)(B) and (a)(3) (A. 7-12).[14] Both parties moved for summary judgment. In support of its motion, the FOMC submitted several affidavits explaining

[13] Respondent also requested the January and February 1975 FOMC memoranda of discussion, which essentially are minutes containing a detailed account of the statements made and actions taken during the Committee's meetings (A. 13). Disclosure of these documents was refused under Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5) (A. 16), and an administrative appeal for the documents was denied (A. 21-22).

[14] The complaint also sought disclosure of the memoranda of discussion for the January and February 1975 FOMC meetings (A. 9).

that its policy of delaying public availability of the Directive and tolerance ranges for a short time had been adopted out of concern that the immediate disclosure of this information was likely to lead to exaggerated market reactions that would seriously interfere with the orderly execution of the Committee's monetary policies and could enable market participants engaged in the speculative trading of government securities to gain unfair profits and advantages (A. 49-51, 53-54, 56-58). Respondent did not submit any affidavit to rebut these contentions.

The district court granted summary judgment for respondent, holding that the Committee's records of its policy actions are not protected against disclosure by Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), because the records are not predecisional, but are the decisions themselves (Pet. App. 36a-37a).[15] The court also ruled that the FOMC's deferred release regulation, even if justified by reasons of monetary policy, failed to satisfy the Act's requirement of "current" and "prompt" disclosure (*id.* at 43a). Accordingly, the court ordered the Committee to cease enforcing 12 C.F.R. 271.5 insofar as it deferred public release of its records of policy actions, to publish the Domestic Policy Directive in the *Federal Register* on adoption, and to make its other policy actions, including statements and interpretations of

[15] The court also rejected the Committee's contention that deferred disclosure is supported by Exemption 2 of the FOIA, 5 U.S.C. 552(b)(2) (Pet. App. 32a-34a).

policy, available for public inspection without delay (Pet. App. 44a).[16]

The court of appeals affirmed, agreeing with the district court that the FOMC's Domestic Policy Directive and tolerance ranges are not predecisional, deliberative communications and that they therefore "cannot fall within Exemption 5's incorporation of the deliberative process privilege" (Pet. App. 10a). The court of appeals acknowledged that disclosure of some final decisions might be deferred until they take effect (*id.* at 12a n.16), but it rejected the related contention that the legislative history of the FOIA shows that Congress intended to prevent premature disclosure of even final and effective decisions where too-prompt disclosure would inhibit the effectiveness of an agency's policy (*id.* at 11a). The court reasoned that, "even if it appeared that Exemption 5 was written with precisely the situation of the instant case in view, we must require [immediate] disclosure unless it is demonstrated that the material in dispute would not be available under the rules of civil discovery" (*id.* at 14a; footnotes omitted). Because it was unaware of any civil discovery privilege recognized at the time that the FOIA was passed that would protect the Directive and tolerance ranges from disclosure (*id.* at 15a-18a), the court of appeals concluded that they must be released as soon as they are adopted.

[16] In addition, the district court ordered disclosure of any reasonably segregable facts in the two requested memoranda of discussion (Pet. App. 41a-42a). The parties then agreed on the factual portions of these memoranda to be produced, and this aspect of the district court's order is not at issue here (*id.* at 5a n. 6). Moreover, after the district court entered its order the FOMC changed its deferral policy to make available all records of policy actions within a few days following the Committee's next scheduled meeting. See page 12 and note 10, *supra*. Because the Record of Policy Actions is not completed and formally adopted until the meeting after the meeting to which it relates, respondent conceded in the court of appeals that the Committee's new guidelines for release of that document are consistent with the FOIA (*id.* at 7a).

SUMMARY OF ARGUMENT

A. Exemption 5 of the Freedom of Information Act authorizes the nondisclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552 (b)(5). This exemption was intended to protect documents that would not "routinely be disclosed to a private party through the discovery process in litigation with the agency." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Although the exemption's primary purpose is to prevent disclosures that might adversely affect the deliberative process, the legislative history of the FOIA demonstrates that Exemption 5 also protects against the *premature* disclosure of agency plans.

In the congressional hearings, a number of federal agencies expressed concern that agency plans, negotiating positions, and similar "final" decisions—including the Federal Reserve System's instructions for the conduct of open market operations—would have to be disclosed before they could be carried out. The

committee reports indicate that Congress responded to these concerns through Exemption 5, which was expressly designed to prevent disclosure of agency plans and instructions prior to their implementation, "where premature disclosure would harm the authorized and appropriate purpose for which they are being used." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36 (1967).

B. The unanswered affidavits in this case show that premature release of the Federal Open Market Committee's monthly Domestic Policy Directive and tolerance ranges is likely to impair the Committee's ability to perform its important monetary policy functions. Open market operations permit the FOMC to implement monetary changes gradually, and this moderate, probing approach is essential to the success of the Committee's policies. Immediate disclosure of the Directive and tolerance ranges would have an "announcement effect," resulting in rapid changes in securities prices and interest rates. Moreover, the sudden movements might be larger than the FOMC contemplated, and if the Committee's instructions should be misinterpreted by market participants prices and rates could move in a direction opposite to that desired by the Committee. These unfortunate consequences not only would impede the FOMC's ability to achieve the nation's economic goals but also would increase the volatility of rates of interest, which could increase the government's

debt financing costs by as much as $300 million annually.

C. The protections provided by Exemption 5 against premature disclosure of agency plans and instructions do not end abruptly once the plans or instructions have been finally adopted. Since predecisional memoranda always were considered to be within the scope of the exemption, the court's construction renders meaningless the congressional attempt to address the significant additional concerns noted by the federal agencies. Unless Exemption 5's safeguards are wholly illusory, agency decisions such as contract bids, negotiating positions, offers to purchase or sell property, and the FOMC's instructions to its Account Manager must be exempt from disclosure until they are carried out, regardless of whether the agency's decision may be characterized as "final" prior to its implementation.

The court of appeals also erred in holding that, even if Congress specifically drafted Exemption 5 to cover the FOMC's instructions, public disclosure would still be required unless the material would not be available to a litigant under established rules of civil discovery. If, as we argue, Congress intended to allow agencies to withhold temporarily materials such as the Domestic Policy Directive and tolerance ranges, then the courts possess an equitable discretion to fashion an FOIA disclosure order to achieve that result. No principle of statutory construction requires a court to give Exemption 5 a wooden reading that undermines both the purposes of the FOIA and the ability

of the FOMC to formulate and carry out monetary policy.

In any event, at least three recognized privileges would prevent a party in litigation with the FOMC from gaining access to the Directive and tolerance ranges during the month that they are operative: the governmental privilege for official information whose disclosure would be harmful to the public interest; Fed. R. Civ. P. 26(c)(7), which authorizes the issuance of protective orders during discovery in order to protect "confidential * * * commercial information"; and Fed. R. Civ. P. 26(c)(2), which allows a court to limit discovery "on specified terms and conditions, including a designation of the time or place." Because privileges available in discovery are also available under Exemption 5, the statute allows the FOMC to defer release to the same extent that would likely be authorized by a protective order under Rule 26(c).

D. A short postponement in release of the Domestic Policy Directive and tolerance ranges would not frustrate any of the purposes underlying the FOIA. Since the instructions are not rules that govern the adjudication of individual rights or require particular conduct or forbearance by the public, a temporary withholding of the information would not be contrary to the policy against "secret agency law." Moreover, because each month's Directive and tolerance ranges, as well as substantial other materials concerning the FOMC's open market operations, are made freely available within days of the

Committee's next monthly meeting, a delay in disclosure would not prevent informed public scrutiny of the Committee's policies.

ARGUMENT

THE FEDERAL OPEN MARKET COMMITTEE'S MONTHLY DOMESTIC POLICY DIRECTIVE AND TOLERANCE RANGES ARE PROTECTED FROM PREMATURE DISCLOSURE BY EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT

A. Exemption 5 Was Intended To Allow Agencies To Prevent Premature Release Of Final Agency Decisions

The Freedom of Information Act "establish[es] a general philosophy of full agency disclosure * * *." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). At the same time, the Act recognizes that it is "necessary for the very operation of our Government to allow it to keep confidential certain material * * *" (*ibid.*). To accommodate these competing interests, the FOIA makes available "to any person" all "identifiable" agency documents, which it divides into three categories: some must be published in the *Federal Register* (5 U.S.C. 552(a)(1)); others must be published or made publicly available and indexed (5 U.S.C. 552(a)(2)); and all others must be furnished on request (5 U.S.C. 552(a)(3)). The FOIA then defines nine categories of documents to which the Act "does not apply" (5 U.S.C. 552(b)). Thus, as the Court observed in *Administrator, Federal Aviation Administration* v. *Robertson*, 422 U.S. 255, 262, "Congress sought to permit access to certain kinds of

official information which it thought had unnecessarily been withheld and, by the creation of nine explicitly exclusive exemptions, to provide a more workable and balanced formula that would make available information that ought to be public [while shielding] * * * certain information where confidentiality was necessary to protect legitimate governmental functions that would be impaired by disclosure."

Exemption 5 of the FOIA permits the nondisclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). This exemption is designed to protect from mandatory disclosure internal government documents that would not "routinely be disclosed to a private party through the discovery process in litigation with the agency." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Accordingly, Exemption 5 "exempt[s] those documents * * * normally privileged in the civil discovery context" (*National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149) and "contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies." *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 91.

Although the exemption's principal function is to avert disclosure of internal, non-final communications that might affect the deliberative process by deter-

ring uninhibited discussion in matters concerning policy-making and decision-making (see S. Rep. No. 813, *supra*, at 9; *Environmental Protection Agency* v. *Mink*, *supra*, 410 U.S. at 86-87), that is not its only purpose. The legislative history of the FOIA demonstrates that Exemption 5 also was designed to protect against the *premature* disclosure of final agency plans. See Davis, *Administrative Law Treatise* § 3A.21, p. 157 (1970 Supp.); Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 Md. L. Rev. 189, 213 (1972); Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 Tex. L. Rev. 1261, 1272 (1970).[17]

The initial draft of the proposed Exemption 5 of the FOIA excluded from mandatory disclosure "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy." Hearings on S. 1160, etc. before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 7 (1965). In congressional hearings prior to enactment of the bill, a number of federal agencies ob-

[17] The two purposes are not wholly distinct. Here, for example, the FOMC's deliberative processes certainly would be affected by the knowledge that its formal decisions would be released prematurely. A rule requiring immediate disclosure thus might persuade the Committee to resort to informal understandings with the Account Manager, to adopt language in the Directive aimed at counteracting anticipated market sense to protect the decision-making process while at the same response to the disclosure, or to employ other tactics not conducive to reasoned policy-making. Moreover, it makes little time mandating hasty disclosures that would render the decision itself ineffective or counterproductive.

jected that this language would require them, to their detriment, to disclose plans, negotiating positions, contract bids, and other "final" decisions before those plans or instructions had been carried out. For example, the Department of Defense expressed concern that information relating to its plans to acquire or dispose of materials, real estate or other property might not be protected (*id.* at 418); the General Services Administration stressed the need to avoid disclosure of information whose early release would prejudice the government's bargaining position in business transactions, "such as expected prices on stockpile sales, expected realization estimates on Government mortgage foreclosures, expected ultimate purchase or sale prices" (*id.* at 480); and the Post Office Department urged that in matters such as the negotiation of contracts and service arrangements it should stand on the same footing as a private party (Hearings on H.R. 5012, etc. before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 224 (1965)). Also among the witnesses was the Acting General Counsel of the Department of the Treasury, who testified (Hearings on H.R. 5012, etc., *supra*, at 49; emphasis added):

> Information as to purchases by the Federal Reserve System, for example, of Government securities in the market, if prematurely disclosed could have, we feel, serious effects on the orderly handling of the Government's financing requirements so that in all of these things there is a question of timing. There are many things

> on which full disclosure is made in reports which are published or filed with the Congress with a timelag, *there is no basic secrecy about these matters, and yet the premature release of these could be very damaging to the general interest.*

Congress responded to these concerns by amending the language of Exemption 5 to its present form. The House Report on the FOIA stated (H.R. Rep. No. 1497, *supra*, at 5-6):

> [I]n some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for nondisclosure, and S. 1160 [the bill that became the FOIA] is designed to permit nondisclosure in such cases.

Accordingly, with respect to Exemption 5, the Report explained (H.R. Rep. No. 1497, *supra*, at 10):

> [A] Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.

The Senate Report similarly construed the coverage of the exemption (S. Rep. No. 813, *supra*, at 9):

> It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

These statements "make it clear that the Congress did not intend to require the production of [internal government] documents where premature disclosure would harm the authorized and appropriate purpose for which they are being used." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36 (1967). Exemption 5 incorporates this intent and protects the FOMC from a requirement that it precipitously release information that would adversely affect its operations.

B. Disclosure Of The Domestic Policy Directive And Tolerance Ranges Prior To Their Implementation Would Seriously Impede The Successful Performance Of The FOMC's Monetary Policy Functions

The unanswered affidavits in this case demonstrate that a brief delay in disclosure of the FOMC's Domestic Policy Directive and tolerance ranges "is an essential element to the effectiveness of open market operations" (A. 54) and that the premature release of these documents "is likely to * * * seriously impede" the "ability of the FOMC to perform its monetary policy functions" (A. 79). As Governor Holland explained, "[o]ne of the most useful aspects of open market operations as a tool of monetary policy is its usefulness in implementing changes gradually or in enabling the FOMC to probe in a given direction while maintaining the ability to withdraw from that course if necessary" (A. 49). This moderate approach is essential to the success of the Committee's policy, because "[e]conomic and financial *stability* is a prime objective of a central bank; and gradual change is often desirable in order to minimize the risk that businessmen, consumers, and investors will overreact and cause economic conditions to worsen, either in the direction of inflation or of recession" (A. 79; emphasis in original).

Immediate public disclosure of the Directive and tolerance ranges would have an "announcement effect" on financial markets, characterized by abrupt movements of securities prices and interest rates as market participants hastened to realize gains in anticipation of the FOMC's purchases or sales of securities (A. 79). To cite just one example, if market participants believed, after viewing the tolerance ranges, that the federal funds rate was likely to rise, many would react immediately by selling securities, which would tend to depress securities prices and inflate interest rates unnaturally (A. 57).[18] The

[18] The greatest speculative profits would accrue to those large or institutional market participants who accurately assessed the Directive and acted rapidly in buying or selling securities (A. 50, 56, 80). Other investors, without freely

sudden price and rate movements would be contrary to the moderate, gradual reaction traditionally sought by the FOMC; perhaps more important, price and rate movements often might be considerably larger than the Committee contemplated and might be beyond the power of the FOMC or the Federal Reserve System to control (A. 56). Market participants on occasion might also misinterpret the Directive and tolerance changes, leading to unintended and unwelcome changes that would have to be overcome by further market activity of the Committee (A. 50-51, 79-80). None of these consequences could be forecast with any precision; each would interfere with the FOMC's efforts to achieve important and coordinated monetary policy objectives.

Finally, disclosure of the Directive and tolerance ranges during the period of their effectiveness would make borrowing operations more costly for the government by imposing substantial additional expenses on its debt financing.[19] The Department of the Treasury relies heavily on dealers in government securities

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available resources to buy or sell immediately, would be disadvantaged by acting after the "announcement effect" had already run its course (A. 50).

[19] The FOMC's policy of deferring the availability of its Domestic Policy Directive long antedates the enactment of the FOIA. See, *e.g.*, Section 6(d), Federal Open Market Committee, *Rules on Organization and Information and Rules of Procedure* (1946); 12 C.F.R. 271.3(d) (1963). The Committee consistently has offered almost all of the reasons we discuss here as reasons for deferring disclosure, and its regulations for more than 30 years have set out and discussed these reasons at length.

to help distribute its offerings. In fulfilling their obligation to make regular markets, these dealers stand ready, on request, to quote firm bid and offer prices on government securities and to do business at these prices. As a result of the sharper fluctuations in interest rates that would inevitably occur from early release of the Directive and tolerance ranges, risks to dealers underwriting these securities as well as to the ultimate purchasers of the securities (in the form of a greater chance to incur capital losses on fixed-income assets) would be increased. This increase in risk would be accompanied by an increase in yields to compensate the risk-takers.[20] Although it obviously is impossible to predict the magnitude of this increase, the FOMC's staff has estimated that these additional borrowing costs could approach $300 million annually, given the publicly held marketable debt of approximately $350 billion. This amounts to an increase of but eight basis points (.08 percent) in the rate of interest on account of the increased market volatility.[21]

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[20] The increase in the rate of interest associated with an increase in uncertainty is a well-documented economic phenomenon. See, *e.g.*, Lorie and Hamilton, *The Stock Market: Theories and Evidence* chs. 11-12 (1973).

[21] The figure of eight basis points represents the midpoint of the range of increased interest rates attributable to an assumed ten percent increase in market volatility, augmented by a factor representing the anticipated widening of the spread between dealer bid and offering rates to the public. This figure was derived from relationships estimated in published studies. See, *e.g.*, Fama, *Forward Rates as Predictors of Future Spot Rates*, 3 Journal of Financial Economics 361-377 (1976);

C. The Domestic Policy Directive And Tolerance Ranges Would Be Exempt From Immediate Disclosure In Civil Discovery Proceedings

Despite the clear evidence in the legislative history of the FOIA that Exemption 5 was drafted to authorize a brief delay in disclosure in precisely the type of situation presented in this case, the court of appeals refused to "infer * * * that Congress contemplated that a final policy decision such as the one at issue here could be kept secret until executed. The policy directives are 'issued' to the Account Manager upon adoption, and they become immediately effective and govern his open-market transactions" (Pet. App. 12a).[22] The court viewed the statements in the House and Senate reports (see pages 25-26, *supra*) only as "illuminat[ing Congress's] concern centering on predecisional materials the exposure of which would be premature because injurious to the deliberative process. It does not indicate that a final

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Modigliani and Shiller, *Inflation, Rational Expectations, and the Term Structure of Interest Rates*, Economica 12-43 (February 1973); Garbade and Rosey, *Secular Variation in the Spread Between Bid and Offer Prices on U.S. Treasury Coupon Issues*, Business Economics 45-49 (September 1977).

[22] The FOMC argued below that its Directive and tolerance ranges are predecisional guidelines protected from disclosure by Exemption 5, and that the *final* decision is made by the Account Manager in buying or selling securities in the open market. Although we believe that the court of appeals' rejection of this argument is incorrect, we have not presented the issue to this Court because the question depends essentially on an analysis of the particular nature of the instructions given to the Account Manager and the role played by that official in the Committee's open market operations.

and effective policy decision may be withheld" (*id.* at 12a-13a). This conclusion misreads the congressional intent.

The principal concern voiced by a number of federal agencies during the hearings on the FOIA was that in some circumstances governmental operations would be significantly impaired if agency plans or policies had to be disclosed before they could be implemented (see pages 23-25, *supra*). As the court of appeals conceded, Exemption 5 was designed to protect such plans or policies from premature disclosure. But since Exemption 5—like the draft that was rewritten in response to the agencies' objections—unquestionably allows the withholding of *predecisional* memoranda,[23] the court's interpretation essentially renders meaningless the congressional attempts to address the problem of premature disclosure raised by the federal agencies. Congress could not have desired to draw an arbitrary line at the point at which "final" instructions were issued to the government official with responsibility for carrying them out. Federal agencies, for example, often issue directions to their employees on the maximum price to pay for equipment or real estate. The ceiling, one would suppose, is a final decision, but surely not one to be disclosed to the seller until the sale has been negotiated. Disclosure unquestionably was to be delayed in such circumstances, whether or not the agency decision to set a ceiling could be characterized as "final."

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[23] See *National Labor Relations Board* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 150-154.

Equally unjustified, in light of the compelling legislative history, is the court of appeals' conclusion that, "even if it appeared that Exemption 5 was written with precisely the situation of the instant case in view, we must require disclosure unless it is demonstrated that the material in dispute would not be available under the rules of civil discovery" (Pet. App. 14a; footnotes omitted). This unyielding interpretation of Exemption 5 would result in the very kind of "wooden" exemption that Congress sought to avoid. See *Environmental Protection Agency* v. *Mink*, *supra*, 410 U.S. at 91. If, as we have argued, Congress intended Exemption 5 to grant some discretion to prevent premature release of decisions, then the seemingly mandatory language employed in the statute does not deprive the courts of their equitable discretion to fashion a FOIA disclosure order to achieve Congress's purpose. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 141.[24]

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[24] See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20-25; *Rose* v. *Department of the Air Force*, 495 F. 2d 261, 269 and n. 23 (C.A. 2), affirmed, 425 U.S. 352; *Consumers' Union of United States, Inc.* v. *Veterans' Administration*, 301 F. Supp. 796, 806 (S.D. N.Y.), appeal dismissed as moot, 436 F. 2d 1363 (C.A. 2). See also Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 767 (1967), and Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Colum. L. Rev. 895, 914 (1974), which acknowledge that Congress intended to leave room for the operation of a limited judicial discretion in enforcement of the FOIA. Compare *Tennessee Valley Authority* v. *Hill*, No. 76-1701, decided June 15, 1978, slip op. 38-40. Moreover, the bare language of a statute is not sufficient to prevent judicial implementation of a clearly disclosed legislative design. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1. Here, for the reasons we have set out, the legislative history of Exemption 5 establishes an especial flexibility.

The court of appeals stated (Pet. App. 16a n. 22) that disclosure was required, despite any equitable considerations, because Congress had rejected "the public interest standard in favor of [a] broad disclosure policy * * *." This consideration may be persuasive when an agency seeks to withhold on equitable grounds a particular document from an otherwise disclosable category of documents. It may even be persuasive in assessing a contention that the public interest requires that a particular category of documents not be disclosed. But the court's unwillingness to entertain equitable arguments is quite inappropriate, we submit, when the question is not disclosure versus nondisclosure, but only disclosure now versus disclosure 30 days from now.

Be that as it may, the court of appeals was mistaken in its assessment of civil discovery procedures. At least three privileges would allow a district court in a civil proceeding to delay routine discovery of documents such as the Domestic Policy Directive and tolerance ranges until they were no longer operative. Because Exemption 5 incorporates all of these privileges,[25] it shields the documents from a requirement of premature disclosure.

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[25] Although the Court has held that Exemption 5 "incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context" (*Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184), these rules "can only be applied under Exemption 5 by way of rough analogies." *Environmental Protection Agency* v. *Mink*, *supra*, 410 U.S. at 86. Moreover, the discovery rules themselves are not hard and fast; "[i]n many important respects, the rules governing discovery in

1. In addition to the government's privilege for military and state secrets (see *United States* v. *Reynolds*, 345 U.S. 1), the courts have recognized a privilege for official government information whose disclosure would be harmful to the public interest. See American Law Institute, *Model Code of Evidence*, Rule 228(b) (1942); Annot., 32 A.L.R. 2d 391, 393 (1953). As one commentator has observed, "[t]hat the sensitive area of any official data, the disclosure of which is demonstrably detrimental to the public interest, as well as the more obvious areas of military and state secrets, are entitled to immunity in discovery and inspection proceedings, as in the course of a trial, is an entrenched common-law evidentiary rule." 12A Bender's *Forms of Discovery* § 5.112, p. 659 (1972).

In *Machin* v. *Zuckert*, 316 F. 2d 336, 339 (C.A. D.C.), certiorari denied, 375 U.S. 896, for example, the court upheld a claim of privilege by the Secretary of the Air Force with respect to witness statements given to an Air Force accident safety board, because disclosure of the reports "would hamper the efficient operation of an important Government program * * *." The same reasoning was applied to deny a FOIA request in *Brockway* v. *Department of Air Force*, 518 F. 2d 1184, 1194 (C.A. 8). See also

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* * * litigation [with the government] have remained uncertain from the very beginning of the Republic" (*ibid.*). Accordingly, the interpretation of Exemption 5 is to "be governed by the same flexible, commonsense approach that has long governed private parties' discovery" of information during litigation with the government (*id.* at 91).

Cooper v. *Department of the Navy*, 558 F. 2d 274, 277 (C.A. 5). This principle would operate in civil discovery to protect the FOMC's monthly instructions from public release until they were fully executed by the Account Manager, for the premature disclosure of the instructions would impair the FOMC's ability to carry out the instructions with the desired effects.[26]

2. The Domestic Policy Directive and tolerance ranges also would be protected from civil discovery during their operative period by Fed. R. Civ. P. 26 (c)(7), which limits the disclosure of "confidential * * * commercial information." This provision allows courts to restrict the dissemination of commercial information that, while perhaps not privileged, may nevertheless be quite sensitive. See 4 Moore's *Federal Practice* ¶ 26.60[4], p. 26-247 (2d ed. 1976); *Corbett* v. *Free Press Association, Inc.*, 50 F.R.D. 179 (D. Vt.); *Rosenblatt* v. *Northwest Airlines, Inc.*, 54 F.R.D. 21 (S.D. N.Y.). Accordingly, courts have entered protective orders either authorizing the nondisclosure of confidential commercial information (see *Roto-Finish Co.* v. *Ultramatic Equipment Co.*, 60 F.R.D. 571 (N.D. Ill.)), or limiting

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[26] The privilege for official governmental information applied in *Machin* is qualified, since it depends on a showing of harm to the public interest. It would therefore be inapplicable in circumstances where, because of the passage of time, disclosure of the information would no longer be detrimental to the public interest. See *Brown* v. *Thompson*, 430 F. 2d 1214, 1215 (C.A. 5); *Capitol Vending Co.* v. *Baker*, 35 F.R.D. 510 (D. D.C.).

access to the disclosed materials (see, *e.g.*, *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 999 (C.A. 10), certiorari denied, 380 U.S. 964; *Xerox Corp.* v. *International Business Machines Corp.*, 64 F.R.D. 367 (S.D. N.Y.); *Schwartz* v. *Broadcast Music, Inc.*, 20 Fed. Rules Serv. 494, 495 (S.D. N.Y.)), or, most significant for present purposes, delaying release of the information until a greater showing of need has been made or the reasons for the material's sensitivity have passed. See, *e.g.*, *DuPont Powder Co.* v. *Masland*, 244 U.S. 100, 103; *Rosenblatt* v. *Northwest Airlines, Inc.*, *supra*, 54 F.R.D. at 23-24; *Capitol Vending Co.* v. *Baker*, 35 F.R.D. 510 (D. D.C.). The Directive and tolerance ranges are the kinds of information that would fall squarely within Rule 26(c)(7). During the month that the instructions provide guidance to the Account Manager they undoubtedly are confidential, and the information is commercial in nature because it relates to the buying and selling of securities on the open market.

3. Even if, as the court of appeals believed (Pet. App. 17a), the Domestic Policy Directive and tolerance ranges would not be considered "commercial" because they involve governmental operations, a district court would still be empowered by Fed. R. Civ. P. 26(c)(2) to issue a protective order delaying their disclosure in civil litigation. Rule 26(c)(2) grants a court broad authority to order that discovery, otherwise mandated by the rules, "may be had only on specified terms and conditions, *including a designation of the time* or place" (emphasis added).

This provision frequently has been invoked to postpone the release of information, including information sought from the government, for short periods of time, in the interests of justice. See, *e.g.*, *Brennan* v. *Local U. No. 639*, 494 F. 2d 1092, 1100 (C.A. D.C.), certiorari denied, 429 U.S. 1123; *Campbell* v. *Eastland*, 307 F.2d 478, 487-488 (C.A. 5), certiorari denied, 371 U.S. 955; cf. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 290-298. See generally 4 Moore's *Federal Practice*, *supra*, *at* ¶ 26.70[2], pp. 26-520 to 26-524.

D. A Brief Delay In Disclosure Of The Domestic Policy Directive And Tolerance Ranges Would Not Frustrate Any Of The Interests That The FOIA Was Designed To Advance

The discussion thus far has demonstrated that Exemption 5 of the FOIA was intended to allow agencies to prevent premature disclosure of "final" decisions such as the FOMC's Domestic Policy Directive and tolerance ranges, that the release of this information would inflict serious harm to the Committee's efforts to manage the nation's monetary policy, and that the information would not be available routinely to a party in litigation with the Committee. But this is only part of the picture. An assessment of the FOMC's deferred release policy also must consider whether a short postponement in disclosure of the materials would be inconsistent with any of the purposes underlying the Freedom of Information Act. We submit that it would not.

To begin with, a temporary withholding of the materials would not contravene the "strong congressional aversion to 'secret [agency] law'" (*National Labor Relations Board* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 153), because the FOMC's instructions apply only to its Account Manager. The Directive and tolerance ranges are not "law," and therefore cannot be "secret law," because they are not rules that govern the adjudication of individual rights or require particular conduct or forebearance by the public (A. 77). See *Cuneo* v. *Schlesinger*, 484 F. 2d 1086, 1091 n. 13 (C.A. D.C.), certiorari denied *sub nom. Rosen* v. *Vaughn*, 415 U.S. 977.

By the same token, a delay in disclosure would pose no threat to open government and would do nothing to frustrate public scrutiny of governmental policies. See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 17. True, "the dominant objective of the Act" is "disclosure, not secrecy" (*Department of the Air Force* v. *Rose*, 425 U.S. 352, 361), but the FOMC's regulations require that the Directive and tolerance ranges for each month, as well as other records that explain in greater detail the economic policy pursued by the Committee, are to be made freely available shortly after the succeeding month's meeting. Respondent's sole purported interest in examining these documents is to study "to what extent current economic and financial factors are taken into consideration by the FOMC in the adoption of its domestic policy directives and other policy actions" (A. 8). Access to the Committee's decisions for

all but the most recent monthly period would fully satisfy his academic needs and would provide an ample record for him or any other person to evaluate the Committee's performance. These prompt and complete disclosures surely are adequate "to ensure an informed citizenry * * * and to hold the governors accountable to the governed." *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, No. 77-991, decided June 15, 1978, slip op. 27. See also *id.* at 28 ("we cannot see how FOIA's purposes would be defeated by deferring disclosure" of NLRB witness statements for a short period of time).

In a previous case involving the proper interpretation of the Freedom of Information Act, this Court remarked:

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

Environmental Protection Agency v. *Mink*, *supra*, 410 U.S. at 80 n.6, quoting from S. Rep. No. 813, *supra*, at 3. The court of appeals ignored these basic principles in ordering immediate release of the FOMC's Domestic Policy Directive and tolerance ranges, a disclosure that would disrupt important economic policy without any corresponding public benefit.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1387

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM,
Petitioner,

v.

DAVID R. MERRILL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 77-1387

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM,

Petitioner,

v.

DAVID R. MERRILL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

Whether a federal agency may, without specific statutory authority, choose to delay public disclosure of its final policy decisions despite the fact that the Freedom of Information Act requires that policy decisions be disclosed promptly?

STATUTE INVOLVED

5 U.S.C. § 552(a)

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying-

* * *

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register . . .

* * *

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing.

* * *

(4)

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the

court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its actions.

SUMMARY OF ARGUMENT

I. A. The Freedom of Information Act ("FOIA" or the "Act") requires each federal agency "promptly" to make available to the public those "statements of policy" which it has "adopted". 5 U.S.C. § 552(a)(1) and (2)(1976). Petitioner Federal Open Market Committee ("FOMC") does not dispute that it is an "agency" and that the records at issue are statements of its policies described in this portion of the Act.

Nor does petitioner claim that its monthly policy directives and tolerance ranges are permanently exempt from disclosure. Instead, petitioner argues that Exemption 5 of the FOIA allows it to delay disclosing the requested records, even though it can point to no part of that exemption, or any other provision of the Act, expressly authorizing deferral of publication. Exemption 5, it asserts, authorizes it to defer publication of its monthly policy statements until a few days after the next monthly statement is adopted. Thus, FOMC's position is that Exemption 5 authorizes it to delay making its policy statements available to the public until they are no longer in effect.

Petitioner's argument ignores the carefully structured provisions of the FOIA, which require that material either be made immediately available or, as long as it remains within one of the nine specific exemptions, need never be disclosed. The FOIA does not provide any mechanism by which an agency may avoid the prompt publication requirement and

defer publication of documents which are not exempt from disclosure. Petitioner's argument ignores not only the plain language of the FOIA, but also the decisions of this Court which have held that the purpose of Exemption 5 is to protect the decisionmaking process by preserving open and frank discussions within agencies. National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975). Although petitioner agrees that the records at issue are not predecisional and are not deliberative communications but, rather, constitute the agency's final policy decisions, petitioner still contends that Exemption 5 applies to the records at issue. Thus FOMC's argument is squarely contrary to this Court's interpretation of Exemption 5. Moreover, in Sears this Court warned that it would be "reluctant" to construe Exemption 5 to apply to policy decisions. 421 U.S. at 153. Thus petitioner has a doubly heavy burden in arguing that Exemption 5 covers these records: in addition to the general burden of proof imposed upon it by the Act itself, 5 U.S.C. § 552(a)(4)(B)(1976), it must also carry the further burden imposed upon it by this Court's "reluctance" to extend Exemption 5 to the particular type of records at issue here.

B. Petitioner's argument based on the legislative history of the FOIA was expressly rejected by the court of appeals below which unanimously found that the legislative history did not "indicate that a statement of agency policy may be withheld subsequent to the date it becomes effective." Petition

for Cert. 12A. Petitioner is unable to show that Congress intended to allow deferral of FOMC decisions and produces no evidence that Exemption 5 was designed to protect the requested records. Petitioner misconstrues Exemption 5 when it expresses fear that unless the judgment below is reversed agencies will have to disclose their most secret plans, including prices to be paid in acquiring or disposing of property, since such plans do not constitute statements of an agency's policies.

C. The FOMC also argues that there are three privileges which would permit delay of routine discovery in civil litigation of the records at issue, and hence, that those records are covered by Exemption 5. None of these privileges is applicable here.

First, petitioner claims an executive privilege for official government information whose disclosure would be harmful to the public interest and cites several cases discussing that privilege. Pet. Br. 34. But those cases involve situations in which discovery was sought of witnesses' statements given in return for a promise of confidentiality which, if breached, would lessen the government's ability to obtain vital information from private sources. Executive privilege simply does not apply to the instant records because disclosure here is sought of final policy decisions, not facts obtained in confidence. Petitioner's argument that prompt disclosure of its policy statements would adversely affect the public in-

terest amounts to an assertion that the courts have discretion, where "secrecy in the public interest" is considered necessary, to authorize withholding of policy records. Congress expressly rejected this approach in adopting the FOIA in 1966, as this Court held in Environmental Protection Agency v. Mink, 410 U.S. 73, 79 (1973).

Second, petitioner argues that Exemption 5 encompasses a privilege for "confidential . . . commercial information", citing Fed. R. Civ. P. 26(c)(7). Pet. Br. 35. Petitioner cites no cases where information generated by the government falls within this privilege. Moreover, the records at issue are not "commercial information" but policy statements. In any event, even if the documents at issue here did contain "commercial" information, Congress did not intend Exemption 5 to apply to such information, since it specifically included exemptions for commercial and financial information in Exemptions 4 and 8. Petitioner does not claim those exemptions apply to the records at issue.

Third, the FOMC, citing Fed. R. Civ. P. 26(c)(2), states that district courts have power to issue protective orders delaying discovery and that this power would apply to its domestic policy statements. The cases cited by petitioner authorized delay of disclosures in the circumstances cited but in none did the courts delay or refuse discovery of an agency's statements of its policy.

II. Petitioner's real argument is not based on the words of the Freedom of Information Act nor on the decisions of this Court interpreting that Act; rather it is based on the FOMC's view that effective implementation of its policies requires less than prompt publication of its policy statements. But many market analysts disagree with the FOMC position favoring delayed disclosure and believe that prompt publication will serve the public interest.

This Court need not choose, however, between the opinions expressed by the FOMC members and monetary experts outside the agency. The disagreement serves to emphasize the wisdom of Congress in phrasing the exemptions in the FOIA so as to minimize the extent to which the courts must balance competing policy arguments. The proper place for petitioner to make its case for delay in prompt publication of its policy statements is in the Congress. As the Court below suggested (Petition for Cert. 18A), it is the "function of the legislature, not the court" to enact "a specific statutory authority for deferral . . . from the prompt availability requirement" of the FOIA.

Following the decision of the court below, legislation was introduced in the Congress which provides for deferring publication of FOMC policy decisions. Should Congress be persuaded by the FOMC's contention that prompt disclosure of its policy decisions would prevent it from functioning effectively, Congress can by statute authorize the FOMC to delay

publication of its policies. Absent such a finding by Congress, the unequivocal language of the FOIA requires the FOMC to publish its policy decisions promptly after they are made.

ARGUMENT

I. THE FREEDOM OF INFORMATION ACT REQUIRES DISCLOSURE OF DOMESTIC POLICY DIRECTIVES AND TOLERANCE RANGES PROMPTLY AFTER THEY ARE ADOPTED.

A. Exemption 5 Of The FOIA Does Not Authorize Deferred Release Of Final Policy Statements.

The Freedom of Information Act requires each Federal agency "promptly" to make available to the public those "statements of policy" which it has adopted. 5 U.S.C. § 552(a)(1) and (2)(1976). These statements may be made available either by "currently" publishing them in the Federal Register or by permitting members of the public to inspect and copy them, or by having them "promptly" published and copies offered for sale. 5 U.S.C. § 552(a)(1) and (2)(1976); (emphasis added). There appears to be no dispute that the records at issue are statements of policy as described in subsection (a)(2) of the statute. Both courts below so held explicitly and the Federal Open Market Committee does not challenge that portion of the lower courts' opinions.

Since the requested records are agreed to be "policy statements", the FOMC must show, if it is to avoid the

requirement of prompt publication, that the FOIA either permanently exempts the requested records from any disclosure requirement or that it permits deferral of publication. The FOMC does not contend, however, that the records are completely exempted from disclosure. Nor does it contend that any part of the Act expressly allows it to defer publication. 1/ Rather, it is the FOMC's position that Exemption 5 provides implied, not explicit, authority to withhold publication of its policy statements for a limited period of time. This argument ignores both the plain language of the FOIA and this Court's decisions concerning Exemption 5.

In reading the FOIA, it is clear that the FOMC's position disregards the structural scheme of the statute, which does not contemplate any delay in the release of non-exempt documents; a record must either be released promptly or,

1/ The only expressed limitation on the command of Section 552(a) of the FOIA that all of an agency's policy statements be made available to the public promptly is in Subsection (a)(2). That subsection permits an agency, "to prevent a clearly unwarranted invasion of personal privacy", to "delete identifying details when it . . . publishes a(n) . . . statement of policy." The scheme of the FOIA is internally logical. If Congress had intended to permit any exceptions to the statutory command of prompt availability, the logical place to put it would have been in Subsection (a)(2). Yet Congress included no authorization for delay in making statements of policy available.

as long as it remains within one of the nine specific exemptions, need never be released at all. 2/ What the FOMC seeks is to delay publication of its Domestic Policy Directives and tolerance ranges until "a few days" after the next monthly meeting of the FOMC at which new policy directives are adopted. Pet. Br. 10, 12. By not releasing the documents until after they are no longer in effect and thus no longer final statements of agency policy, the FOMC is not merely seeking to delay but rather to permanently exempt its policy statements from disclosure. The FOMC's offer to release documents which no longer constitute "statements of policy" at all is plainly inconsistent with the specific requirements of the FOIA.

2/ The only means by which a delay in publication might ever be authorized would be through the enactment of a statute meeting the requirements of Exemption 3 and authorizing the withholding of records for a specified time. The court in Aviation Consumer Action Project v. Civil Aeronautics Board, 418 F. Supp. 634, 637 (D.D.C. 1976) found that there was a statutory basis, separate from the FOIA, for an Executive Order requiring the CAB to defer publication of certain material for 5 days. The situation in Aviation Consumer Action in which deferral was allowed by statute must be distinguished from that in this case in which the only authorization for deferral is provided by the petitioner's own regulation (12 C.F.R. § 271.5(1978)).

The FOMC's position concerning Exemption 5 is inconsistent not only with the plain language of the FOIA, but also with this Court's holdings concerning that provision of the FOIA. By its terms, Exemption 5 exempts from disclosure those records 3/ "which would not be available by law to a party other than an agency in litigation with the agency." Thus, Exemption 5 entitles the public to all those agency records that a private party could discover in litigation with the agency. Environmental Protection Agency v. Mink, 410 U.S. 73, 85-86 (1963). The purpose of Exemption 5 is to protect the decisionmaking process by preserving open and frank discussions within agencies which otherwise could be inhibited if all internal agency memoranda were subject to disclosure. National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

In its opinion in Sears this Court explicitly warned that it would be "reluctant" to construe Exemption 5 to apply to policy decisions of the type described in 5 U.S.C. § 552(a)(2)(1976), which are precisely the type of policy decisions at issue in this case. National Labor Relations Board v. Sears, Roebuck & Co.,

3/ The words of the exemption apply only to "memorandums or letters" but the courts appear to have interpreted the exemption so as to apply to all types of documents. See, e.g., National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975).

supra at 153. Thus, petitioner, which has the burden of showing the records sought are exempt, 5 U.S.C. § 552(a)(4)(B)(1976), 4/ has a particularly heavy burden in this case, since it must overcome the reluctance of this Court to hold that statements of agency policy are within Exemption 5.

The Court explained in its opinion in Sears the reasons for its reluctance to construe Exemption 5 as exempting any records of agency policy statements. After quoting Professor Davis' conclusion that Exemption 5 requires the disclosure of an agency's effective law and policy, this Court continued:

> This conclusion is powerfully supported by the other provisions of the Act. The affirmative portion of the Act, expressly requiring indexing of "final opinions", "statements of policy and interpretations which have been adopted by the agency", and "instructions to staff that affect a member of the public," 5 U.S.C. § 552(a)(2), represents a strong congressional aversion to "secret (agency) law," Davis,

4/ Petitioner, doubtless inadvertently, failed to include this provi-
(footnote continued on page 15)

> supra, at 797; and represents an affirmative congressional purpose to require disclosure of documents which have "the force and effect of law." H.R. Rep. No. 1497, p. 7. We should be reluctant, therefore, to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2); . . .

National Labor Relations Board v. Sears, Roebuck & Co., supra at 153.

To be sure, in Sears this Court was dealing with final agency legal opinions and in this case it is dealing with final agency economic policies. However, that distinction is not relevant in determining the applicability of Exemption 5, in view of the fact that the statute makes no distinction based on the particular subject matter of the policy statements which are required to be released. 5 U.S.C. § 552(a)(2)(1976). Petitioner's argument that Exemption 5 contains an implied right to delay the release of its policy statements is thus contradicted both by this Court's opinion in Sears and by the unambiguous language of the Freedom of Information Act.

(footnote continued from page 14)
sion of the Act in its presentation of the statutes involved. See Pet. Br. 2-3 and supra 2-3.

B. The Legislative History Of The FOIA Does Not Support The Theory That Exemption 5 Authorizes Deferred Disclosures

Finding no support in the language of the Act or court decisions, petitioner's argument is reduced to the proposition that the legislative history of Exemption 5 demonstrates a congressional intent to permit any agency to defer public disclosure of any of its policy statements if prompt release "would adversely affect its operations." Pet. Br. 26. Contrary to the Federal Open Market Committee's interpretation, the legislative history does not support the deferred disclosure theory. Petitioner's reliance on two passages from the House Report and one from the Senate Report accompanying the bill that became the Freedom of Information Act is misplaced. Pet. Br. 25-26. The first quotation from the House Report does not support the petitioner's position because it is taken from a paragraph which discusses the need to protect the agency's internal management procedures, not its statements of policy. 5/ The second quotation from the House Report cited by petitioner

5/ The complete paragraph reads: "Matters which relate solely to 'internal management' and thus can be withheld under the provisions of 5 U.S.C. 1002 range from the important to the insig-
(footnote continued on page 17)

interpreting Exemption 5 also fails to lend support to the deferred disclosure argument. When read in context, the quoted passage simply indicates that the House Committee viewed Exemption 5 as protecting pre-decisional material,

(footnote continued from page 16)

nificant. They range from a proposed spending program, still being worked out in the agency for future presentation to the Congress, to a routine telephone book. In 1961, for example, the Secretary of the Navy ruled that 'telephone directories fall in the category of information relating to the internal management of the Navy,' and he cited 5 U.S.C. 1002 as his authority for this ruling. (footnote omitted). On the other hand, [in some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for nondisclosure, and S. 1160 is designed to permit nondisclosure in such cases."] H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966)(footnote omitted). Petitioner quoted only the section above which appears in brackets.

not final conclusions. 6/ Similarly, the portion of the Senate Report quoted by petitioner cannot be viewed as a discussion of the deferred disclosure theory, much less an endorsement of the theory. Pet. Br. 26. Instead, the Senate Report's discussion of Exemption 5 concentrates on responding to the agencies' fear that the Freedom of Information Act would make it "impossible to have any frank discussion of

6/ The passage states: "Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.' Moreover, [a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.] S. 1160 exempts from disclosure material 'which would not be available by law to a private party in litigation with the agency.' Thus any internal memorandums which would routinely be disclosed to a private
(footnote continued on page 19)

legal or policy matters." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added). Thus, this language, like the language quoted from the House Report, demonstrates only that the fifth exemption was designed to protect predecisional material, not the decision or policy itself. The Senate Report language quoted by petitioner indicates that the Committee recognized the problems which might be created by the FOIA, but felt that the advantages to be gained from a more open government outweighed these problems. In the rare instances where the Committee did not find those advantages to outweigh any potential problems, specific exemptions were allowed by the statute.

All three passages quoted by petitioner are so general as to have caused the court of appeals below to characterize the Federal Open Market Committee's argument as based on "[a]mbiguous inferences from legislative history." Petition for Cert. 14A. Moreover, as explained above, none of the passages quoted applies to statements of the agency's policy after that policy has been adopted in final form and becomes effective. In the words of the court of appeals:

(footnote continued from page 18)
party through the discovery process in litigation with the agency would be available to the general public." H.R. Rep. No. 1497 89th Cong., 2d Sess. 10 (1966) (emphasis added). The portion of the paragraph quoted by petitioner appears in brackets.

> We cannot infer from this language that Congress contemplated that final policy decision (sic) such as the one at issue here could be kept secret until executed. The policy directives are "issued" to the Account Manager upon adoption, and they become immediately effective and govern his open-market transactions. The House Report does not indicate that a statement of agency policy may be withheld subsequent to the date it becomes effective.

Petition for Cert. 14A. (footnote omitted).

As petitioner notes, a representative of the Treasury Department, in testifying on the Freedom of Information Act in 1965, referred to the consequences, adverse in his view, of requiring premature disclosure of "purchases by the Federal Reserve System, for example, of Government securities in the market." Pet. Br. 24. The Treasury Department used this argument as evidence of the need for including a general exemption in the FOIA similar to the "in the public interest" language of the Administrative Procedure Act and the Treasury Department regulations in

force in 1965. Hearings on H.R. 5012, etc. Before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 49 (1965). Apparently, Congress was not persuaded by the Treasury Department's argument, for the FOIA does not include a general exemption provision. 7/ Petitioner therefore can not rely upon the Treasury Department testimony to support its argument that this Court should now engraft upon the Act a provision allowing deferred disclosure.

During the same testimony a discussion between Congressman Griffin and the Treasury Department's Acting General Counsel alerted the Subcommittee to a situation analogous to that in the case at hand. Congressman Griffin noted that under the Freedom of Information Act the Government would no longer be able to defer disclosures of information concerning the United States' gold

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7/ The House Report accompanying the Freedom of Information Act discussed the abuse of the general "in the public interest test" and explained the need for specific, not general, exemptions. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-7 (1966). Similarly, the Senate Report attacked the general withholding exemption as contrary to the policy of full disclosure. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

purchases unless the information was protected by one of the specific exemptions. Hearings on H.R. 5012, etc. Before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 70 (1965). In discussing particular exemptions which might allow the government to withhold information relating to such gold purchases, the Treasury Department representative did not discuss or question Exemption 5. Id. at 51-56. Thus, contrary to the FOMC's unsupported assertion that Exemption 5 was adopted, in part, in response to the Treasury Department's concerns regarding premature disclosure, the complete absence of Treasury comment on this exemption indicates that the Treasury Department did not even inform the Subcommittee of any possible application of Exemption 5 to disclosure of policy decisions, let alone inspire any changes in the Act. 8/ Nor did the Federal Reserve Board itself mention the need for deferred disclosures or problems in Exemption 5 in its correspondence commenting on the original Freedom of Information legislation. See Hearings on H.R. 5012, etc. Before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 247 (1965).

Petitioner also points to testimony in which representatives of various federal agencies expressed concern that

8/ See opinion of the court of appeals below. Petition for Cert. 14A, n. 18.

the Act would require agencies to disclose plans to acquire or dispose of real estate or other property, the prices at which agencies expected to buy or sell materials, etc. Pet. Br. at 23-24. These matters are not involved in this case. We are dealing with an agency's final policy statements and not with the daily conduct of an agency's housekeeping affairs. For example, if the General Services Administration adopted a general policy of not constructing federal office buildings in areas where construction would require destruction of existing housing, the Freedom of Information Act, we submit, would require that the policy statement be made available to the public. On the other hand, GSA's decision to acquire specific real estate and the price ranges it expected to pay, even if reduced to writing, could hardly be characterized as statements of agency policy, and accordingly would not be affected by the decision in this case.

The legislative history of the 1974 amendments to the Freedom of Information Act further weakens the deferred disclosure theory. Congress viewed agency delays in responding as a major problem requiring immediate correction. Speaking in support of the 1974 amendments, Congressman Thone said, "Information is only available if it is timely." 120 Cong. Rec. 6,810 (1974). Senator Hruska, speaking in favor of the bill as reported, pointed

out that time limits on agency responses are crucial and must be short enough to avoid delays to the requester. 120 Cong. Rec. 17,021 (1974). Thus, the thrust of the 1974 amendments was to speed up disclosure, rather than delay it.

In sum, the legislative history of neither the original Freedom of Information Act nor the 1974 amendments supports the deferred disclosure theory. Indeed, the theory urged by the FOMC here is an attempt to overturn a specific congressional disavowal of a general exemption, to be applied whenever the agency wishes to argue that disclosure is not "in the public interest." Rather than supporting the agency's right to defer disclosure, the legislative history emphasizes the importance of the Freedom of Information Act's prompt, broad disclosure requirements and the narrowness of the tightly drawn exemptions which are inapplicable in this case.

C. There Are No Privileges That Would Exempt The Records At Issue From Discovery In A Civil Proceeding

In addition to its argument based on the legislative history of Exemption 5, petitioner asserts that there are "three privileges" which "would allow a district court in a civil proceeding to delay routine discovery of documents such as the Domestic Policy Directive and tolerance ranges until

they were no longer operative." Pet. Br. 33. We consider each of these asserted privileges and show that none is applicable.

First, the FOMC relies on an asserted "privilege for official government information whose disclosure would be harmful to the public interest" "in addition to the government's privilege for military and state secrets." Pet. Br. 34. 9/ To support its position the FOMC cites three court of appeals decisions: Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963); Brockway v. Department of the Air Force, 518 F.2d 1184, 1194 (8th Cir. 1975); Cooper v. Department of the Navy, 558 F.2d 274, 277 (5th Cir., 1977).

In all three cases plaintiffs sought access to government reports made in the course of an accident investigation, and the decisions in all three cases rest on a government privilege attaching to statements obtained from private citizens on a promise of confidentiality. In Machin, the court upheld a claim of privilege by the Secretary of the Air Force for witness statements given to an Air Force accident investigation board. The court said:

9/ We agree, of course, that Exemption 1 of the FOIA clearly exempts records relating to "national defense and foreign policy" but these are not involved in this case.

> We agree with the Government that when disclosure of investigatory reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program and perhaps even . . . impair the national security . . . the reports should be considered privileged.

316 F.2d at 339.

In Brockway, the court relied on possible impairment of "the deliberative processes of the Air Force" in finding that Exemption 5 authorized withholding the statements. 518 F.2d at 1194. In Cooper, the court cited both Machin and Brockway and noted that in "an aircraft accident investigation, assurances of confidentiality may be especially needed to obtain full disclosures." 558 F.2d at 227.

We submit that the court below correctly distinguished these cases when it noted:

> The privilege for witnesses . . . cannot be extended to reach the instant situation, because neither the fact-gathering ability nor the decision-

> making process of FOMC would be undercut by disclosures of these final policy decisions.

Petition for Cert. 16A-17A.

The FOMC's reliance on a privilege relating to the protection of witnesses is therefore completely inappropriate here. Essentially, the FOMC's argument with respect to the first asserted "privilege" is nothing more than a claim that the agency should be able to withhold information whenever it believes disclosure is not "in the public interest." That argument is plainly an attempt to substitute the judgment of the agency for that of the Congress when it enacted the FOIA. That Act contains its own measures of the disclosures that would be harmful to the public interest. As this Court pointed out in its first opinion interpreting the Act, Congress, in adopting the FOIA, rejected the provision in the former public disclosure statute (5 U.S.C. § 1002, 1964 ed.) of maintaining secrecy where required "in the public interest." See Environmental Protection Agency v. Mink, 410 U.S. 73, 79 (1973). 10/

10/ As the court below put it, "This argument runs counter to Congress' express rejection of the public interest standard in favor of the broad disclosure policy embodied in the FOIA." Pet. App. 16A, n. 22.

We had supposed it to be clear that Congress had relieved the agencies and the courts of the necessity of considering the economic impact of compliance with the Act's disclosure commands. See Environmental Protection Agency v. Mink, 410 U.S 73, 80 (1973), quoting S. Rep. No. 8 3, 89th Cong., 1st Sess. 3 (1965). One difficulty in relying on an agency's conclusions as to the duration of the adverse economic consequences of disclosures is aptly illustrated by the history of the Federal Reserve Board's regulation shielding the records at issue here. 12 C.F.R. § 271.5 (1978). Prior to 1967, the records were published only annually; in mid-1967, after the Freedom of Information Act took effect on July 4, 1967, the agency delayed their publication for approximately ninety days. Petition for Cert. 38A, and 5A, n. 7. On March 24, 1975, after plaintiff wrote to the Board seeking the records at issue (Pet. Appendix 13) FOMC shortened the delay to 45 days. 40 Fed. Reg. 13,204 (1975). And again, after the opinion of the district court in this case, the period of delay was changed once again to "a few days" after the monthly meeting of the FOMC following the adoption of the Domestic Policy Directive and tolerance ranges. 41 Fed. Reg. 22,261 (1976). This history confirms the congressional observations that an agency's own assessment of the need for secrecy is bound to err in favor of nondisclosure. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 4-5 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 3-5 (1965).

Petitioner also claims a second privilege, subsumed within Exemption 5, for "confidential . . . commercial information," relying on Fed. R. Civ. P. 26(c)(7). Pet. Br. 35. As the court below pointed out, the FOMC failed to "present a single case where information generated by government fell within this privilege." Petition for Cert. 17A. But beyond the lack of judicial authority for petitioner's position is the fact that it distorts the accepted meaning of words to describe the Domestic Policy Directive of the Federal Open Market Committee of the Federal Reserve System as "commercial". If that policy statement is commercial then the Annual Budget of the President could just as easily be called "commercial information." Even if the information at issue here were arguably "commercial" in nature, petitioner cannot claim that information is exempted from disclosure by the general language contained in Exemption 5 since Congress specifically addressed the exemption of commercial and financial information in Exemptions 4 and 8 of the FOIA. In Exemption 4 Congress exempted "privileged or confidential" commercial or financial information but only if the information had been obtained by an agency from non-governmental sources, 5 U.S.C. § 552(b)(4)(1976), thus ex-

cluding from the exemption such information obtained from another agency or generated by the agency itself. In Exemption 8, Congress exempted agency records relating to the financial condition of banks and other "financial institutions." This Court has recently described the nine exemptions as having been "carefully structured" by Congress. National Labor Relations Board v. Robbins Tire & Rubber Co., 98 Sup. Ct. 2311, 2316 (1978). It mocks that careful structure to argue, as petitioner does, that Exemption 5 also exempts "commercial" information.

In sum, we submit that the records at issue contain no "commercial" information, and if, contrary to our position, those records do contain such information, they are not exempt from prompt public inspection because the information was not obtained from non-governmental sources and does not relate to the financial condition of banks or similar institutions. Beyond this, we invite the Court to examine an example of the records at issue (see Pet. Appendix 60); we believe that examination will confirm that those records contain policies of the agency rather than "commercial information."

Finally, the FOMC asserts a third privilege, arguing that Fed. R. Civ. P. 26(c)(2) empowers the district court to issue protective orders delaying disclosure of the Domestic Policy Directive. Pet. Br. 36-37. Petitioner cites,

as containing examples of such protective orders, Brennan v. Local No. 639, International Brotherhood of Teamsters, 494 F.2d 1092, 1100 (1974), aff'd in part, rev'd in part on other grounds sub nom., Usery v. Local No. 639, International Brotherhood of Teamsters, 543 F.2d 369 (D.C. Cir. 1976), cert. denied, 429 U.S. 1123 (1977); and Campbell v. Eastland, 307 F.2d 478, 487-88 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963).

We submit that these cases are irrelevant here. In Brennan, supra 494 F.2d 1092, the Secretary of Labor sued to set aside an election of union officers and moved for summary judgment. The district court entered an order preventing the defendants from obtaining discovery against the Secretary until five days after the summary judgment motion was decided. The court of appeals upheld the district court's grant of summary judgment and found that the protective order was within the district court's discretion and did not prejudice the union, since discovery would not be needed unless the union could withstand the motion for summary judgment. Brennan, supra at 1100. Campbell involved a taxpayer who sued for a refund and obtained a district court discovery order against the government to produce reports of agents who had investigated the plaintiff for tax fraud. The court of appeals held that it was error to permit the taxpayer his discovery while

criminal proceedings against him were imminent. The court said that the discovery order

> was an open invitation to taxpayers under criminal investigation to subvert the civil rules into a device for obtaining pre-trial discovery against the Government in criminal proceedings.

307 F.2d at 488. 11/

Thus, the FOMC has not cited a single case in which a court, either under the Federal Rules of Civil Procedure or under the Freedom of Information Act, has delayed or refused discovery of a federal agency's written statements of its policy. By relying on cases such as Brennan and Campbell, petitioner would use Fed. R. Civ. P. 26(c)(2) to establish a principle that, in any case in which an agency has determined that delay is advisable to prevent a serious impediment to its functioning, Exemption 5 overrides the FOIA's clear command that statements of agency policy not otherwise exempt from disclosure be made promptly available.

11/ Campbell did not arise under the FOIA; if it had, the Government would have successfully interposed Exemption 7. See National Labor Relations Board v. Robbins Tire & Rubber Co., 98 Sup. Ct. 2311, 2314 (1978).

Such a broad interpretation of Exemption 5 would expand that provision to swallow up the Act's specific requirement in subsection (a) for prompt disclosure of each agency's policy statements and final opinions. We respectfully submit this Court should not adopt an interpretation of the FOIA so plainly inconsistent with the intention of Congress.

II. DISAGREEMENT AMONG EXPERTS REGARDING THE WISDOM OF PROMPT DISCLOSURE OF FOMC POLICY DOES NOT ALTER THE FOIA REQUIREMENT THAT POLICY DECISIONS BE PROMPTLY DISCLOSED

In the preceding section we have shown that the language of the Act, as interpreted by this Court, requires that the records at issue be disclosed promptly after their adoption and that Exemption 5 does not allow a delay in publishing the records. Petitioner's real argument is not based on the words of the Act at all. Rather, it is based on the FOMC's view, expressed in affidavits filed in the district court, that effective implementation of the agency's policy requires delayed publication of the records at issue. 12/ In this section

12/ Repeatedly in its brief, petitioner refers to "unanswered" affidavits filed by petitioner in the district court. See, e.g., Pet. Br. 26 Respondent did

(footnote continued on page 34)

we shall show that, in the view of many experts outside the agency, delay in making the Domestic Police Directive available, far from being clearly necessary, is unwise. Those experts believe, contrary to FOMC's position, that prompt publication will not defeat implementation of FOMC policies but rather will serve to implement the public interest by minimizing the advantage now enjoyed by market specialists. In presenting the considerations which favor prompt disclosure we seek only to inform the Court that there is considerable public controversy among the experts whether immediate publication of FOMC policy decisions is in the public interest. We respectfully submit that, although we do not think it is necessary for this Court to resolve the conflict in opinions between the FOMC and experts outside that agency, the Court should be informed of the nature of the arguments on both sides.

For example, Sherman Maisel, a member of the Federal Reserve Board and hence, an ex officio member of its Open Market Committee, from 1965 to 1972, has published a book in which among other topics he discussed the arguments for and against prompt publication of the agency's policies. We set forth below an extract from that discussion:

(footnote continued from page 33)
not "answer" the affidavits because he believed them irrelevant and both courts below agreed.

> Another argument put forth [by the Federal Reserve Board] against announcement of policy changes is that if the Fed is too specific it may enable individuals and firms to profit at the expense of the general public. Vast sums of money move through security markets. Federal Reserve policies, when announced explicitly, would not mean much to the average citizen. Only specialists could interpret them, thus increasing their profits inordinately. Most experts on markets, however, would take the opposite position. They believe that the better the information, the better the market. Under the present system, market experts can profit from the delay in releasing information. Hidden information is valuable to people in the market, and they can afford to spend a lot to obtain it. Their information systems, based

on a continous study of Federal Reserve operations and statements, are good. They can afford to search out special insights (a careless phrase in conversation can be valuable). After those inside the market have profited from their knowledge, they make it available to customers and eventually to the public. Of course, they may make mistakes in their reading of the Federal Reserve, but, on the whole, many do make considerable profit at the expense of those less intimately involved in day-to-day government security operations. [emphasis added].

Sherman Maisel, Managing the Dollar, 174-175 (1973).

Former Governor Maisel does not stand alone in the views we have just quoted; several prominent bankers and economists share his opinions concerning the adverse consequences of failure to make the records at issue here promptly available to the public.

Last year the Subcommittee of Domestic Monetary Policy of the House Committee on Banking, Finance and Urban Affairs held hearings on a bill (H.R. 9465) to require that detailed minutes of the FOMC meetings be kept and released to the general public three years after the meetings are held. Introduction of the bill was triggered by the FOMC action in May 1976, following by about two months the decision of the district court in this case, to discontinue preparation of its Memoranda of Discussion which included detailed accounts of the FOMC meetings. Petition for Cert. 5A n. 6. 13/ See Hearings on H.R. 9465 and H.R. 9589 Before the Subcommittee on Domestic Monetary Policy of the House Committee on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. (1977)(hereinafter referred to as "Hearings").

Prior to the Hearings, the House subcommittee solicited the views of business leaders and professors on H.R. 9465. Many of the experts who responded on the question as to the Memoranda of Discussion also offered opinions on the advisability of releasing the records at issue in this case promptly after their adoption. See Hearings at 202, 204, 225, 252, 270, 279, 299. For example Professor

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13/ Although originally plaintiff had sought access to the Memoranda of Discussion (see Pet. Appendix,
(footnote continued on page 38)

Milton Friedman of the University of Chicago wrote:

> May I say also that I have long been in favor of the immediate release of the records of policy actions of the FOMC. I have recommended repeatedly in testimony to Congress that the FOMC meetings be held on a Friday so that the record of policy actions can be written . . . and then released not later than Sunday night so that no business days pass without this record being available.

Hearings at 202. 14/

Mr. Beryl W. Sprinkel, Vice President and Economist of the Harris Bank, urged that "a summary of the FOMC's action be released immediately." He added:

(footnote continued from page 37)
13) the applicability of the FOIA to these Memoranda is no longer at issue in this case. See Petition for Cert. 6A n. 8.

14/ Professor Anna J. Schwartz of the National Bureau of Economic Research,
(footnote continued on page 39)

> I continue to believe that such knowledge would help to stailize short-term swings in financial markets by eliminating much of the mystery and uncertainty . . ."

Hearings at 277.

Professor David H. Pyle of the University of California at Berkeley expressed a preference for release of "a record of policy action on the day after each meeting." Hearings at 299. He explained that delay "may provide economic advantages to those institutions which deal directly with the Open Market Desk." Hearings at 300. Professor Pyle pointed to the immediate release of Department of Agriculture crop reports and noted that "strong market responses to the new information in crop reports . . . do not appear to be destablizing in the commodities futures markets." Id.

Professor William Poole of Brown University advised the Committee that he favored "very rapid release" of information on policy actions "[i]n contrast to my recommendation for de-

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(footnote continued from page 38)
Inc. expressed agreement with Professor Friedman. Hearings at 270.

layed release of policy deliberations." Hearings at 238. 15/ He also noted the danger of profiteering from "inside information" so long as the records are not promptly released. Id. 16/

15/ Former Governor Maisel also wrote to the Subcommittee summarizing the views he had expressed in his book, quoted supra 35-36. See Hearings at 225. Like Professor Poole, Mr. Maisel favored a substantial delay in making public the Memoranda of Discussion at the FOMC meetings, in contrast to the policy directive which, he wrote, should be available on the close of the day the FOMC meets and adopts it. Id. See also Hearings at 228 (Professor James Meigs); Hearings at 252 (Professor Peter Temin); Hearings at 279 (Professor Richard Sylla).

16/ Professor Poole's letter continued as follows:

> For example, if the IRS interprets a new regulation in a particular way, then the information should be available to everyone and not just to the particular taxpayer whose case led to the interpretation; the same argument obviously applies to most bank regulatory actions by the Federal Reserve. Id.

Dr. William Gibson, Vice President and Director of Monetary Affairs of Smith, Barney, Harris Upham & Co., an investment banking firm, made a telling point in his letter to the Committee, noting that by the time the 30 day delay period has expired, "virtually everyone who follows markets closely knows what the Committee's policy has been." Hearings at 204.

Dr. Gibson's comments serve to emphasize the conflict between the FOMC's refusal promptly to announce their current policy directive and the statutory scheme of the Freedom of Information Act. The Act is designed to put all private citizens on an equal footing with respect to access to recorded government policies. Even assuming absolute secrecy were a wise policy in the case of the records at issue, the policy cannot be enforced because market experts divine the current FOMC policy before it is made public and profit from their expertise. Since the Freedom of Information Act has as one of its premises that all citizens should have access to the same agency policies at the same time, prompt release of the records at issue supports one of the Act's primary policies.

In recent years, the enormous impact of the FOMC's operations on money supply and interest rates has become a matter of common knowledge and of wide public interest. Financial

writers closely follow the actions of the FOMC and seem able to discern the FOMC policy decisions far in advance of their official release. For example, referring to the FOMC's policy of delayed disclosure of policy decisions, Edwin L. Dale wrote in the New York Times on May 25, 1976:

> Judging from what has happened in the money market in the last few days [tightening of monetary policy], a further step in that direction was probably taken at the committee's meeting last Tuesday, although a summary of that meeting will not be released until mid-June.

New York Times, May 25, 1976, at 47, col.5

On April 20, 1978, John H. Allan wrote in his Financial Column:

> The Federal Reserve in a surprise move, appeared to tighten monetary policy yesterday, raising interest rates and pushing bond prices down sharply.

New York Times, Apr. 20, 1978, § D, at 1, col. 2.

United Press International reported on July 19, 1978:

> The Fed's Open Market Committee met in Washington yesterday to set policy. Although results won't be published for 45 (sic) days, money market actions sometimes indicate what the committee decided.

Washington Post, July 19, 1978, § D, at 1, col. 3.

Thus the financial press realizes the widespread public interest in what the FOMC is doing and the experts frequently are able to divine the FOMC moves before they are made public. Meanwhile, as former Governor Maisel points out in his scholarly book, the insiders follow the operations of the manager of the Open Market Account in buying and selling securities and profit from the delay in releasing the information to the public at large.

We submit that the disagreement among the experts as to the effect of the FOMC disclosure policies serves to emphasize the wisdom of Congress in phrasing the exemptions in the FOIA so as to minimize the extent to which the courts must balance competing policy arguments. Where the Congress intended

the courts to have a role balancing competing interests in disclosure, it specifically so provided. Exemption 6, for example, requires the courts to balance the policy against invasions of personal privacy against the policy of disclosure of agency records. See Department of the Air Force v. Rose, 425 U.S. 352, 372-73 (1976). Congress gave the courts no such responsibility in construing Exemption 5. It must be remembered we are here dealing with open market operations in a law suit seeking to enforce a statute designed to provide "access to official information long shielded unnecessarily from public view." Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1973). "[D]isclosure, not secrecy, is the dominant objective of the Act." Rose, supra, 425 U.S. 352, 361 (1976).

The court below ended its opinion by inviting Congress to consider changes in the Act should it determine that prompt publication of the records sought here could impede implementation of the national monetary policy. Petition for Cert. 18A. The suggestion was a wise one. We respectfully submit that this Court is not the proper forum before which to seek the resolution of the conflict of opinions between the FOMC and experts outside that agency. Congress is the appropriate body to weigh the merits of the arguments regarding disclosure and, if it finds the FOMC's position persuasive, it should amend the FOIA to exempt the policy decisions from prompt disclosure. In fact, following

the decision in the court of appeals below, Senator Proxmire on January 25, 1978 introduced a bill by request that would defer publication of the FOMC Domestic Policy Directives. S. 2427, 95th Cong., 2d Sess. (1978). No action has yet been taken by the Senate Committee considering the bill.

The suggestion of the court of appeals that the FOMC's arguments should be addressed to the Congress and not to this Court is especially persuasive because of the limited scope allowed for judicial discretion by the framers of the FOIA. In interpreting the Freedom of Information Act the role of the courts is not similar to their role either in constitutional exegesis or in statutes like the Sherman Act whose terms, as this Court said many years ago, have "a generality and adaptability comparable to that found to be desirable in constitutional provisions." Hughes, C.J., for the Court in Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933). To the contrary, the provisions of the Freedom of Information Act are quite detailed and reasonably precise. Both courts below held that the records in question were of the type required by Subsection (a)(2) of the Act to be made publicly available promptly and were not covered by Exemption 5. As this Court's opinion last June in National Labor Relations Board v. Robbins Tire & Rubber Co., 98 Sup. Ct. 2311, 2316 (1978) observed, "Congress carefully

structured nine exemptions from the otherwise mandatory disclosure requirements" of the FOIA. Thus, there is now no longer room for argument that any court has discretion to authorize agency delay in making records not covered by any exemption promptly available for public inspection.

We therefore believe that the policy arguments on which petitioner relies here should be addressed to the Congress for its consideration and decision. As this Court said last June in rejecting arguments that it interpret the Endangered Species Act "reasonably",

> We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words . . . .

Tennessee Valley Authority v. Hill, 98 Sup. Ct. 2279, 2301-02 (1978). Here too, Congress has spoken in "the plainest of words", and this Court has no mandate to strike a balance of equities. The Freedom of Information requires the FOMC to publish its statements of policy without delay, and that agency should be required by this Court to comply with the requirement of that Act.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

No. 77-1387

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

DAVID R. MERRILL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Respondent relies heavily (Resp. Br. 5, 12-15) on the Court's statement in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975), that "[w]e should be reluctant * * * to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2)," which includes "statements of policy and interpretations which have been adopted by the agency." As the previous portions of its opinion clearly indicate, however, the Court's "reluctance" was based on the congressional concern that the withholding of "statements of policy"—that is, "the 'working law' of the agency" (*ibid.*)—would result in "secret agency law." Perhaps the primary purpose of the Freedom of Information Act, as the Court noted, was "to require disclosure of documents which have 'the force and effect of law.' " *Ibid.*, quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966).

Here, of course, there is no threat of "secret agency law," since the FOMC releases each month's Domestic Policy Directive and tolerance ranges within a few days after the following month's meeting. But more important, as we pointed out in our main brief (page 38), the Directive and tolerance ranges do not govern the adjudication of individual rights or require particular conduct or forbearance by the public and thus are not "law." Respondent concedes that many "final" agency decisions, such as "GSA's decision to acquire specific real estate and the price ranges it expected to pay" (Resp. Br. 23), do not qualify as "statements of agency policy." By the same token, the FOMC's monthly directions to its Account Manager are not the "working law" of the agency and do not have a direct impact on the conduct of private persons. Hence, application of Exemption 5 to delay their disclosure for a short period of time would not encounter *Sears'* "reluctance" to apply the exemption to "agency policy."

2. Although respondent does not dispute that the problem of premature disclosure of the FOMC's monthly Domestic Policy Directive was mentioned explicitly during the congressional hearings on the Act, he contends that other aspects of the legislative history demonstrate that these statements are entitled to little weight. For one thing, respondent argues, "[i]n discussing particular exemptions which might allow the government to withhold information relating to * * * gold purchases, the Treasury Department respresentative did not discuss or question Exemption 5" (Resp. Br. 22). For another, "the Federal Reserve Board [did not] itself mention the need for deferred disclosures or problems in Exemption 5 in its correspondence commenting on the original Freedom of Information legislation" (*ibid.*). Respondent's second assertion is inaccurate and his first assertion is beside the point.

To begin with, it is not surprising that the Treasury Department spokesman before the House Committee did not specifically discuss Exemption 5, either in connection with the gold purchase issue or in the further colloquy cited by respondent. In both instances, the questioning concerned claims not of premature disclosure, which is the situation here, but of nondisclosure, and the reasons offered by the Treasury to support its request for nondisclosure in matters such as "records of how the ink and paper are prepared for the production of currency" (*Hearings on H.R. 5012 Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 51 (1965)), "records which pertain to private corporations and individuals" (*ibid.*), "taxpayer's files" (*id.* at 54), and "trade secrets" (*id.* at 55), related to interests other than those dealt with by Exemption 5.

Moreover, respondent's charge that the Board itself did not inform Congress of any problems that might arise as a result of the Act is refuted by the letter sent to the House Committee by Federal Reserve Chairman William McChesney Martin, Jr. on March 10, 1965. "Applied to this Board," Chairman Martin wrote, "there is reason to believe that a literal construction of the eight exemptions from disclosure contained in H.R. 5012 could leave exposed to indiscriminate public demand certain critical records and materials relating to the Board's credit and monetary policy functions, as well as to other of its statutorily directed functions. Such a result could impair the Board's effectiveness both as an instrument of national economic policy and as a regulatory body." *Hearings on H.R. 5012, supra,* at 247. In addition, a staff analysis of the comments on the Act submitted by a number of federal agencies, including the Federal Reserve Board, reported that some government representatives had predicted that "[t]rouble in the business world" would

result from public access to the "business, financial, and income tax information which the bill would disclose prematurely * * *" (*id.* at 266).[1]

3. Exemption 5 is designed to protect from mandatory disclosure internal government documents that would not "routinely be disclosed to a private party through the discovery process in litigation with the agency." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Accordingly, it "exempt[s] those documents * * * normally privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 149) and "contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies." *EPA* v. *Mink,* 410 U.S. 73, 91 (1973).

Although respondent does not deny that these principles must guide the construction of Exemption 5, he concludes (Resp. Br. 32) that "the FOMC has not cited a single case in which a court, either under the Federal Rules of Civil Procedure or under the Freedom of Information Act, has delayed or refused discovery of a federal agency's written statements of its policy." It is certainly true that the precise situation presented here has not arisen in any reported decision, but the cases we did cite in our opening brief (pages 30-37) illustrate the district court's broad power in related contexts to fashion a discovery remedy, including an appropriate protective

[1]Respondent's position also is not aided by statements in the legislative history of the 1974 amendments to the Act (Resp. Br. 23-24). Those comments, as well as the 1974 amendments themselves, merely reflect Congress' impatience with administrative delays in processing requests for documents immediately disclosable under the Act, not with purposeful delays occasioned by a desire to avoid frustrating the effective implementation of an agency's policy.

order, to satisfy the competing interests. This, then, is the essential question: if in civil litigation between a private party and the FOMC the private party were to seek immediate discovery of the Committee's current Domestic Policy Directive and tolerance ranges, would a court have discretion to delay production of those materials for a few weeks until the Directive was no longer in effect? The answer to that question is plainly yes, and the same approach should govern access to these documents under the Act.

4. We doubt the propriety, at this stage of the proceedings, of respondent's attempt for the first time to rebut the FOMC's consistent contention that premature disclosure of its Domestic Policy Directive and tolerance ranges would be detrimental to the public interest. Respondent had full opportunity to offer evidence to the contrary in the district court, yet he chose not to do so, asserting (as he concedes, Resp. Br. 33 n.12) that the matter is irrelevant to the legal issues presented. Both lower courts agreed with respondent and held that, even if the immediate release of the Directive and tolerance ranges would frustrate important governmental policies, the Act prohibits any delay in disclosure (Pet. App. 18A, 43A). The record thus requires this Court also to decide the case on the assumption that disclosure of the Directive and tolerance ranges during the period of their effectiveness would inhibit the successful accomplishment of the FOMC's monetary goals.

Having said this, we do not wish to leave unrebutted the impression, fostered by respondent's presentation, that the entire academic and financial community agrees with respondent that the FOMC's delayed disclosure policy is unwise or even counterproductive. Although we question whether much weight should be given to conclusory remarks made in passing by a few persons while commenting on legislation directed to a different problem,

as respondent has done (Resp. Br. 37-41),[2] we note that several of these comments supported the FOMC's view. For example, Professor Donald D. Hester informed the House Committee that "[s]uccessful discretionary policy depends in part on being able to implement a strategy which smoothly achieves a goal. With immediate disclosure of a new set of goals, it is possible that serious and severe disruptions could be precipitated in financial markets. * * * I therefore feel that the Board should continue its practice of providing records of broad policy actions and summaries of views with a lag of 30 days." *Hearings on H.R. 9465 and H.R. 9589 Before a Subcomm. of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 212-213 (1977). Other experts expressed similar thoughts. See *id.* at 189-190 (Professor George L. Bach); *id.* at 198 (J. Dewey Daane); *id.* at 222 (Professor A. Leijonhufvud); *id.* at 303-304 (Charles J. Scanlon). Of course, none of these offhand conclusions, either for or against immediate disclosure, can compare with the detailed affidavits submitted below by the FOMC officials charged with the responsibility of promoting the efficiency and success of the Federal Reserve System's open market operations (A. 49-51, 53-54, 56-58).

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[2]The sole exception is the statement, in the book written by former Board member Sherman Maisel, that most market experts believe that the immediate disclosure of changes in Federal Reserve policies would not lead to unfair advantages by market speculators (Resp. Br. 35-36, quoting S. Maisel, *Managing the Dollar* 174-175 (1973)). This opinion, however, does not address the more important problem whether immediate disclosure would impair the effectiveness of open market operations. It is also significant that, while urging a freer disclosure policy for the FOMC, Maisel had "recognize[d] the strong opposing arguments * * *." *Hearings on H.R. 9465 and H.R. 9589 Before a Subcomm. of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 225 (1977).

For the foregoing reasons, and those set forth in the government's main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1387

THE FEDERAL OPEN MARKET COMMITTEE
OF THE FEDERAL RESERVE SYSTEM,
Petitioner,

v.

DAVID R. MERRILL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND FREEDOM OF INFORMATION CLEARINGHOUSE

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INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary association of newsreporters and editors dedicated to promoting the First Amendment and freedom of information interests of the public in being informed, through its press, about the operations of government. The Freedom of Information Clearinghouse is a non-profit organization which was founded in 1972 to assist members of the public and the press in the effective use of laws granting a right of access to government-held information.

The Reporters Committee and the Clearinghouse submit this brief *amici curiae*, with the written consent of the parties, to urge the Court to affirm the decision below that the Freedom of Information Act ("FOIA") requires the public release of the final policy decisions of the Federal Open Market Committee ("FOMC") immediately upon their adoption by the agency. It is *amici*'s view that this is the only result that would be consistent with the underlying purpose of the FOIA in providing all members of the public an equal right of access to information concerning the working policies and operations of the Executive Branch of government. Of all the activities of the Federal Reserve System, none affects the average citizen more than the decisions of the FOMC, which influence interest rates each month and therefore determine how much the average wage-earner's dollar will be worth. However, under the Federal Open Market Committee's present rule of delaying disclosure of its Domestic Policy Directives and tolerance ranges until after the adoption of superseding directives at its next monthly meeting—and thus until its policy statements are no longer in effect—average citizens and the press which reports to them may only guess at the state of existing monetary policy. At the same time, a small group of influential investment bankers, who act as buying and selling agents for the Federal Reserve, have immediate insights into FOMC's policies and are free to profit from the valuable "inside" information they can discern. The practical effect of FOMC's secrecy policy on the buying and selling of government securities is therefore to disadvantage those members of the financial community and the general public who do not have special access.

Aside from their belief in the importance of disclosure of the information at issue, however, the Reporters Committee and the Clearinghouse are appearing in this case because acceptance of the interpretation of the FOIA urged by the

FOMC is likely to have an adverse impact on the public's right to know that reaches far beyond resolution of the controversy presented here. The FOMC's position ultimately rests on the claim that its statements of policy are exempt from the prompt disclosure requirements of the FOIA because timely release would allegedly impair the efficiency of its operations and therefore be contrary to FOMC's notion of where the "public interest" lies. In our view, the suggestion that any statement of operative policy may be withheld, even if only temporarily, whenever an agency has determined in its discretion that the "public interest" so requires is a notion wholly at odds with the Congressional mandate that all agency records must be promptly disclosed unless "exempt under clearly delineated statutory language," S. Rep. No. 813, 89th Cong., 1st Sess 3 (1965), and is in direct conflict with the prior decisions of this Court.

ARGUMENT

THE LANGUAGE AND LEGISLATIVE HISTORY OF THE FREEDOM OF INFORMATION ACT, AS INTERPRETED BY THIS COURT, REQUIRE THAT THE DOMESTIC POLICY DIRECTIVES OF THE FEDERAL OPEN MARKET COMMITTEE BE PROMPTLY DISCLOSED.

This case concerns the applicability of the requirements of the Freedom of Information Act, 5 U.S.C.§ 552, to the policy directives issued each month by the Federal Open Market Committee of the Federal Reserve System, which constitute final statements of general monetary policy. Emphasizing that the Freedom of Information Act requires that "the policy statements at issue in this case must be publicly released upon their adoption by the agency unless they fall within a specific FOIA exemption," (App. 18A), the court of appeals examined both the language and the legislative

history of the only exemption upon which petitioner relies, exemption 5, but found no basis upon which to supplant the clear mandate of the statute that such final directives be published immediately after the meeting at which they are adopted. The FOMC, however, now urges this Court to find that the FOIA permits the withholding of "even final and effective decisions where too-prompt disclosure would inhibit the effectiveness of an agency's policy." (Br. at 16). We submit that, as a matter of law, the court of appeals was correct in its conclusion that exemption 5's protections for information ordinarily privileged in the civil discovery context do not encompass the final policy statements at issue here.

As this Court has articulated in prior decisions interpreting the framework and intent of the FOIA, the Act is specifically structured to require that information including "final opinions . . . made in the adjudication of cases," and "statements of policy and interpretations which have been adopted by the agency" be "expressly disclosable under § 552(a)(2) of the Act, pursuant to its purposes to prevent the creation of 'secret law.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136-138 (1975). In addition, the Act applies to all other "identifiable records," which must be made available on request, § 552(a)(3), unless they fall within the nine exempt categories specifically enumerated in § 552(b). *Id.* at 137; *EPA v. Mink*, 410 U.S. 73, 79 (1973). As this Court has repeatedly stressed, disclosure is the dominant purpose of the Act and the exemptions are thus to be narrowly construed. *E.g. Department of the Air Force v. Rose*, 425 U.S. 352, 360-62 (1976).

In prior decisions, this Court has also examined the purpose and scope of exemption 5, which incorporates the Government's "executive privilege," upon which FOMC so

heavily relies. That privilege protects from civil discovery those advisory opinions which comprise the deliberative processes of government agencies. *NLRB v. Sears, Roebuck & Co., supra*, 421 U.S. at 149-150; *EPA v. Mink, supra*, 410 U.S. at 86-87. In *Sears*, the Court concluded that exemption 5, properly construed, permits "the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be," while requiring the "disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy." 421 U.S. at 153 (citations omitted). On the basis of both this analysis and the recognition that the requirements in section 552(a)(2) represent "an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law,'" the Court held in *Sears* that exemption 5 could never apply to "final opinions" such as those at issue in that case. *Id.* at 153-154. In addition, the Court concluded that it would be "reluctant" to construe exemption 5 to apply to any of the other documents described in § 552(a)(2), which include "statements of policy" such as the FOMC directives here. *Id. See also Renegotiation Board v. Grumman Aircraft*, 421 U.S. 168, 186-88 (1975).

While it is apparent that the court of appeals properly construed exemption 5 in light of these precedents, FOMC now essentially asks the Court to put its prior rulings aside. The Open Market Committee urges the Court to read into the scope of exemption 5's deliberative process privilege a Congressional intent to vest agencies with the discretion to delay the disclosure of even their final policy statements—in this case, until after those policies are no longer in effect—whenever an agency determines that the FOIA's mandated immediate release would "inhibit the effectiveness

of an agency's policy" (Br. at 16). And if no such Congressional intent can be found in the legislative history as it relates to exemption 5's incorporation of the executive privilege, FOMC alternatively asks the Court to read into exemption 5 a far broader "privilege for official government information whose disclosure would be harmful to the public interest" (Br. at 34). As the court below found, after a careful review, there is nothing in the legislative history of exemption 5 from which such a Congressional intent to permit the withholding of final and effective policy decisions can be inferred.

Most importantly, however, FOMC's argument also runs counter to Congress' express and repeated rejection of any interpretation of the FOIA which would permit agencies unfettered discretion to make disclosure decisions on the basis of vague "public interest" standards. Congress has instead explicitly reserved for itself the role of determining what must be disclosed consistent with a philosophy of the broadest possible disclosure. In *EPA v. Mink, supra,* this Court reviewed the history of the legislation which served as the predecessor to the Freedom of Information Act, and pointed out that Congress had amended the law specifically because the prior statute has been "plagued with vague phrases, such as that exempting from disclosure 'any function of the United States requiring secrecy in the public interest.'" 410 U.S. at 79. This Court then pointed out that the FOIA provisions "stand in sharp relief against those of § 3[the former law]," since the nine exemptions in the Act are "explicitly made exclusive," and represent "congressional determination[s]" of the types of information the Executive Branch has the option to withhold. *Id.* at 79-80. It is thus clear that in adopting the FOIA, Congress rejected a broad public interest standard like that which petitioner seeks to now reintroduce into the Act through exemption 5.

FOMC's interpretation in this case is also at odds with Congress' most recent amendment to the Act. In 1976, Congress amended exemption 3 in order to overrule the decision of this Court in *Administrator, FAA v. Robertson,* 422 U.S. 255 (1975), which held that the Act should not be interpreted to overrule other statutes which granted unlimited discretion to agencies to withhold information from the public. Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1247. As noted by Mr. Justice Powell, in enacting that amendment, "[c]ongress tightened the standard for Exemption 3 'to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information,' and rejected *Robertson,* which was viewed as 'afford[ing] the FAA Administrator *cart[e] blanche* to withhold any information he pleases . . . .'" *NLRB v. Robbins Tire and Rubber Co.,* ___ U.S. ___, 98 S. Ct. 2311, 2330 (1978) (opinion concurring in part and dissenting in part), *quoting* H.R. Rep. No. 880, 94th Cong., 2d Sess. 23 (1976). *See also American Jewish Congress v. Kreps,* 574 F.2d 624, 628 (D.C. Cir. 1978) (the thrust of the amendment is "to assure that basic policy decisions on governmental secrecy be made by the Legislative rather than the Executive Branch.")

Acceptance of the interpretation of the FOIA urged by FOMC in this case would again provide agencies *carte blanche* to keep secret their final decisions and statements of policy whenever an agency determined that disclosure would not promote the efficiency of its operations or otherwise would not be consistent with the "public interest." As the Court concluded below, Congress has the option of enacting a specific statutory exemption or authority for deferral if it should determine that release of FOMC's directives and tolerance ranges would in some way impede the implementation of monetary policy (App. 18A). The

question of what economic consequences would flow from immediate disclosure of the policy directives is one upon which experts disagree, however, with noted economists and even a former Governor of the Federal Reserve System joining *amici* in their view that prompt disclosure of the FOMC's policies would promote, rather than hinder, the public interest. *See* S. Maisel, *Managing The Dollar*, 35-36, 174-175 (1973); *see generally* Hearings on H.R. 9465 and H.R. 9589 before the Subcommittee on Domestic Monetary Policy of the House Committee on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. 204, 225, 270, 279, 299 (1977); *Federal Reserve Policies and Public Disclosure* (Erb, ed.) (American Enterprise Institute, 1978). We submit that, given the history of the FOIA and its amendments, the court below properly recognized that Congress provides the only appropriate forum in which this debate of public policies should be resolved.

Indeed, the Board of Governors of the Federal Reserve has already set this legislative process in motion. On January 25, 1978, legislation was introduced at the Board's request which would provide the specific statutory authority to delay disclosure of the domestic policy directives which the FOMC has asked this Court to create. S. 2427, 95th Cong., 2d Sess., 124 Cong. Rec. S 438 (daily ed. January 25, 1978). However, Senator Proxmire, who introduced the bill at the request of the Board, specifically reserved judgment on the merits of FOMC's contention that immediate release would have adverse effects on the ability of the FOMC to implement national monetary policy. *Id.* Since Congress will thus make an independent determination of whether specific statutory deferral authority is warranted, *amici* respectfully suggest that it is unnecessary to construe existing exemptions to the FOIA more broadly than Congress intended, in order to address the FOMC's concerns.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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